Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

COLIN E. BAYLISS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the refusal of the District Court to afford the Petitioner an opportunity to demonstrate the "materiality" of exculpatory evidence purposefully withheld by the government deprived Petitioner his due process rights under the Fifth Amendment of the Constitution, as defined by this Court in Brady v. Maryland, 373 U.S. 83 (1963), Kyles v. Whitley, 514 U.S. 419 (1995) and their progeny.

PARTIES TO THE PROCEEDING

Petitioner

Colin E. Bayliss, Petitioner, is an individual and has no corporate affiliations.

Respondent

United States of America

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The opinion of the United States Court of Appeals for the Sixth Circuit is not reported. A copy of the Opinion is included in the Appendix at Appendix A at 1a-29a. The Opinion of the District Court for the Northern District of Ohio is also not reported and is included in Appendix B at 30a-67a. The District Court ordered entry of the final judgment on September 18, 1998.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its Opinion on January 28, 2000.[1] Petitioner filed a Petition for Rehearing and Suggestion for Rehearing *En Banc* which the Untied States Court of Appeals denied on March 28, 2000 (App. C at 68a-69a).[2] This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254.

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[1] A Corrected Opinion was issued in April 12, 2000 after Petitioner's Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied.

[2] Citations to "App." are to the appendix filed with this Petition for Writ of Certiorari pursuant to Supreme Court Rule 14(i).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Petitioner Colin E. Bayliss was indicted on October 8, 1996 by Indictment alleging, *inter alia*, that Petitioner and his Co-Defendants conspired to submit false Medicare and Medicaid claims in violation of 18 U.S.C. § 371. Counts 2 through 39 referred to specific health care claims which had been submitted to Medicare or Medicaid and which were alleged to have been false in violation of 18 U.S.C. § 287.

The matter proceeded to trial by jury. The jury convicted Petitioner as to all Counts of the Indictment. Petitioner filed a Motion for Entry of Judgment of Acquittal, or Alternative Motion for New Trial that was overruled by the District Court. Petitioner was sentenced to 63 months of imprisonment, a period of supervised release of two years, and restitution in the amount of $1,665,000. Petitioner is currently incarcerated in the Federal Correctional Institution in Morgantown, West Virginia.

At trial, the government called three witnesses -- Wendy Arrendale, Barbara Marting and Rod McCauley -- who testified that they had raised questions regarding the propriety of the blood glucose billing program conducted by Clinitec, a company owned by Petitioner. Ms. Arrendale, a former billing supervisor with Clinitec, testified that she had shown Petitioner's co-defendant, Raymond Pinkerton who was President of Clinitec, and another Clinitec executive a Medicare Manual provision that specifically prohibited a laboratory from billing for work performed by nursing home personnel. She further testified that she was unable to locate that manual provision again. This testimony was consistent with her Grand Jury testimony and the summary of interview provided by the government during discovery.

Ms. Arrendale was asked on cross-examination about the number of times that she had met with representatives of the government. Ms. Arrendale testified that it was most likely that she had talked to such government representatives on only one prior occasion. Only after trial would Petitioner learn that Ms. Arrendale was lying when she gave these answers. Only after trial would Petitioner learn that the government was aware that Ms. Arrendale was testifying falsely. Only after trial would Petitioner learn that the government had taken no action to correct the false answers given by Ms. Arrendale from the witness stand.

One day after she testified at trial, Ms. Arrendale filed a civil complaint against Clinitec and Petitioner in the Court of Common Pleas for Tuscarawas County, Ohio. In connection with that civil lawsuit, both Ms. Arrendale and Special Agent Thomas Fluhart of the Ohio Attorney General's Office Division of Medicaid Fraud Control provided deposition testimony. These depositions revealed that Wendy Arrendale had participated in numerous pre-trial meetings with government agents and attorneys both before and after Clinitec was indicted. Contrary to her testimony at trial, Ms. Arrendale acknowledged being interviewed on at least three separate occasions by government agents and/or attorneys. Special Agent Fluhart testified about four separate pre-trial interviews of Ms. Arrendale that he either conducted or which he attended in the company of a Special Assistant U.S. Attorney. The deposition testimony confirmed that Ms. Arrendale had been shown a Medicare or Medicaid manual at four of the six meetings she had with government agents and attorneys, and that she told the government these were not the manual she showed to the Clinitec executives.

Counsel for the Petitioner had no knowledge Ms. Arrendale had been shown manuals in an attempt to have her

identify one as the manual she allegedly showed to the Clinitec executives. Petitioner had no knowledge that Ms. Arrendale had been questioned face-to-face on at least six occasions by agents and attorneys for the government. Despite a specific request that the government produce summaries of these meetings, no such summaries were produced before or during trial. The government only acknowledged these meetings after defense counsel brought the existence of these meetings to the attention of the Trial Court.

After Petitioner had learned of the government's numerous secret meetings with Ms. Arrendale, and after he had filed his Motion for New Trial, counsel for the government produced a second summary of an interview with Ms. Arrendale conducted on September 6, 1996. This interview summary is materially different from the summary of the same September 6, 1996 meeting provided to defense counsel prior to trial. The undisclosed interview summary indicated that the agent showed Ms. Arrendale a Medicare and a Medicaid manual, neither of which Ms. Arrendale recognized as the document she purportedly showed to the Clinitec executives. No rational explanation has been given as to why the first memorandum contained no reference to the agent showing several manuals to Ms. Arrendale during the interview.

During the course of the depositions in the civil case, Petitioner learned that four undisclosed meetings had also been conducted with Barbara Marting. Special Agent Fluhart testified in his deposition that he and a Special Assistant U.S. Attorney had met with Ms. Marting. The government acknowledged that this meeting took place and that Petitioner had never been provided with discovery concerning what had transpired during the meeting. To this day, Petitioner does

not know whether any exculpatory material was divulged at this meeting, as the government has still not provided Petitioner with its notes of this meeting.

The government has admitted to conducting a second undisclosed meeting with Ms. Marting on June 24, 1997. Petitioner has never been provided with discovery with respect to this second meeting. In each instance where a government attorney and a government agent met with a witness, only the attorney kept notes of the interview, which, after trial, the government claimed were protected by the work-product doctrine. The government never asserted this privilege claim at the time the documents were sought in discovery, and the Petitioner was thus not afforded a pre-trial determination of whether these materials should be produced in discovery. After trial, the District Court refused to order the government to provide Petitioner with copies of these notes.

The government also conducted two secret meetings with Rod McCauley, again providing Petitioner with no discovery regarding the meetings. The first was conducted by the Special Assistant U.S. Attorney. The government did not acknowledge or provide discovery of this meeting until the day of the hearing on Petitioner's Motion for New Trial.[3] No discovery has ever been provided to Petitioner, although it is likely that exculpatory or impeachment material was generated during this meeting. At trial, the AUSA revealed that she had Mr. McCauley review his grand jury testimony and "[w]rite

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[3] Attached to the December 4, 1997 letter from the AUSA was an additional interview summary for a former Clinitec employee which also had not been produced to Petitioner prior to trial.

down any notes of anything that [he] saw in [his] grand jury testimony that looked inaccurate . . ." These notes arguably should have been produced pursuant to the *Jenks* Act, 18 U.S.C. § 3500, but were never provided to defense counsel.

Petitioner used the information learned from the Arrendale and Fluhart depositions in the civil trial as a basis for his Motion for Entry of Judgment of Acquittal or Alternative Motion for New Trial. Petitioner argued, *inter alia*, that his Fifth Amendment due process rights, as defined by Brady v. Maryland, 373 U.S. 83 (1963) were violated by the government's failure to produce exculpatory and impeachment material resulting from these meetings.

In its response to the Petitioner's Motion for New Trial, the government admitted that it had conducted several secret meetings with Ms. Arrendale, and that the summaries of the interviews either were inadvertently not produced, or privileged.[4] Petitioner moved for production of the attorney and agent notes of these meetings. The Court conducted a hearing on Petitioner's Motion for New Trial, however no evidence was heard.

The Trial Court undertook an *in camera* review of the government's interview files with respect to the former Clinitec employees. After conducting the review, the Court determined that only one piece of Brady material had been withheld from Petitioner. With respect to the numerous meetings with Ms. Arrendale that Petitioner claimed were

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[4] The government's assertion of an unspecified privilege indicates that the government made a knowing and willful pre-trial decision not to produce discovery to the Petitioner.

Brady, the Court failed to reach the issue, determining that the existence of these meetings was not "newly discovered."

An appeal was taken to the United States Court of Appeals for the Sixth Circuit. Unlike the District Court, the Court of Appeals determined that the evidence was newly discovered and that it did constitute Brady material. However, without remanding the issue for an evidentiary hearing, the Court of Appeals found that Ms. Arrendale had been sufficiently impeached upon cross-examination. The Court of Appeals concluded that the failure to produce the Brady material did not undermine the Court's confidence in the outcome of the trial. Neither the District Court, nor the Court of Appeals, commented on the government's failure to correct Ms. Arrendale's perjured trial testimony.

In all, there were over twelve meetings conducted by government agents and attorneys with Wendy Arrendale, Barb Marting and Rod McCauley. These individuals provided the only testimony regarding Petitioner's knowledge of acceptable billing practices. Impeachment evidence garnered during the twelve undisclosed meetings should have been turned over to defense counsel prior to trial. The cumulative effect of withholding even the impeachment evidence revealed to date[5] deprived Petitioner of a fair trial.

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[5] Petitioner has no idea what impeachment evidence resulted from Barb Marting's four meetings with government attorneys or investigators. Nor has Petitioner received the notes Mr. McCauley made prior to trial when he reviewed his grand jury testimony for inaccuracies.

ARGUMENT FOR GRANTING WRIT

The government withheld several pieces of Brady evidence from Petitioner, who only discovered the existence of this evidence after trial. The trial court denied Petitioner's motion for new trial, finding that the evidence was not newly discovered and never reaching the issue of whether it was Brady material. The Court of Appeals, while finding the evidence was both newly discovered and Brady material, determined that it did not undermine their confidence in the outcome of the trial, as Petitioner was able to sufficiently impeach Ms. Arrendale without the withheld evidence.

However, neither court addressed the fact that Ms. Arrendale's trial testimony was in direct contradiction of some of the withheld statements made to the government. While the government attorneys were well aware of Ms. Arrendale's prior statements, they allowed her false testimony to go uncorrected.

When Petitioner became aware after trial that Ms. Arrendale had attended several meetings with the government agents and attorney, he moved for production of documents memorializing these meetings. The government turned over two such documents then asserted, for the first time, the work-product doctrine with respect to all of the meetings between Ms. Arrendale and the government attorneys. Although government agents were also present at the meetings, they did not memorialize the content of these meetings as they had all other contacts with the witness. The trial court allowed the government to use the work-product doctrine as a shield to prevent Petitioner from learning what occurred at these meetings. The trial court further prevented Petitioner from discovering what exculpatory evidence may

have been revealed at the meetings by refusing to conduct an evidentiary hearing with respect to the meetings.

With nothing more than the deposition testimony of Ms. Arrendale and a government agent in a civil case against Petitioner, the Court of Appeals determined that there was Brady material withheld by the government. However, in any instance where there was a discrepancy in the testimony of Ms. Arrendale and the affidavits filed by the government in response to Petitioner's motion for new trial, the Court of Appeals resolved the discrepancy in favor of the government. The Court of Appeals also decided that the Petitioner was able to adequately impeach Ms. Arrendale without the withheld evidence.

Petitioner has a right to due process of law under the United States Constitution. In contravention of this right, and the protections this Court has put in place to protect this right, in the form of Brady and its progeny, the trial court and the Court of Appeals allowed the government to obtain a conviction of Petitioner while denying him due process. Both courts determined that Ms. Arrendale's testimony was important, however they denied Petitioner the opportunity to fully inform the jury of her credibility and the truthfulness of her testimony at trial, by refusing to allow Petitioner to make use of the Brady evidence purposefully withheld by the government both before and after trial.

ARGUMENT 1

The intentional refusal of the government to produce Brady material allowed perjured testimony to go uncorrected by government attorneys resulting in a basic violation of Petitioner's due process rights.

The government intentionally refused to produce several interview summaries from meetings conducted with Wendy Arrendale until after the trial had concluded. The two documents that were produced after trial clearly showed that Ms. Arrendale had testified at trial to matters which were inconsistent with the statements she had made during her interviews with government agents. Despite the fact that her testimony conflicted with her earlier statements, the government attorneys did nothing to correct her testimony at trial, although they were in possession of documents showing her earlier statements to the contrary of her trial testimony, and even though the government knew that Petitioner had not been provided with impeachment materials.

Ms. Arrendale testified upon direct examination that there had been no change in Clinitec's glucose billing program after she showed the Medicare manual provision to the Clinitec executives. However, when asked the same question by a government agent during his investigation, she stated that Clinitec discontinued the program shortly after the executives saw the manual provision. Petitioner had not received the memorandum of the agent's interview prior to trial. It is not clear whether Ms. Arrendale's trial testimony was untruthful, or whether she lied in the statement she made to the investigator. Regardless, the government attorney was well aware of Ms. Arrendale's prior statement when the

testimony was elicited at trial and the attorney allowed it to go uncorrected.

On cross-examination, Ms. Arrendale testified that she only had one meeting with government agents, which occurred when she was served with her Grand Jury subpoena. Only after trial did Petitioner learn that Ms. Arrendale had at least six meetings with government agents and attorneys, several of which were attended by one of the attorneys sitting at counsel table at trial. This attorney did nothing to correct Ms. Arrendale's false testimony that only one meeting had occurred. If this testimony had been corrected at trial, Petitioner would have learned not only that Ms. Arrendale lied during her trial testimony, but also that the government attempted on at least four occasions to have Ms. Arrendale identify various manuals as the one she showed to the Clinitec executives. Not only was this impeachment evidence, but it tended to show that such a manual and provision did not exist.

This Court has previously written:

> [w]e recognized that a prosecutor's knowing presentation of false testimony is 'inconsistent with the rudimentary demands of justice.' Mooney v. Holohan, 284 U.S. 103, 112 (1935). We have refined this principle over the years, finding a due process violation when a prosecutor fails to correct testimony he knows to be false, Alcorta v. Texas, 355 U.S. 28 (1957), even when the falsehood in the testimony goes only to the witness's credibility, Napue v. Illinois, 360 U.S. 264 (1959). See also Giglio v. United States, 405 U.S. 150 (1972) (new trial required when government witness testified falsely on matters

relating to credibility and the prosecutor who served as trial counsel should have been aware of the falsehood).

Jacobs v. Scott, 513 U.S. 1067 (1995) (dissenting opinion). In the case at bar, false testimony by at least one witness went uncorrected by trial counsel, resulting in a denial of Petitioner's due process rights. Petitioner does not know what transpired during the meetings between the government attorneys and Barbara Marting or Rod McCauley. The trial court determined that the attorney's notes were not inconsistent with these individuals' Grand Jury testimony and did not have to be produced. However, the government attorney admitted these notes were not intended to be a complete record of the interview. Also, it is possible that information was learned that was not elicited from Ms. Marting or Mr. McCauley in front of the Grand Jury. Only an evidentiary hearing where these individuals could be called as witnesses and questioned would determine whether any additional Brady material was withheld, or whether these individuals gave false, uncorrected testimony at trial.

ARGUMENT 2

The mere fact that government attorneys are the persons who documented the contents of their meetings with witnesses does not allow the government to claim that the work-product doctrine justifies the government's refusal to produce such notes, where the notes constitute Brady material.

Several of the witness interviews were conducted by a Special Assistant U.S. Attorney with a government

investigator present. The investigator made no notes of these interviews, thus nothing was produced by the government regarding these meetings. Nor was the fact that the interview occurred disclosed during discovery. After trial, it was learned that notes had been kept by a government attorney present at the meeting.

When Petitioner discovered that there were notes kept of the meeting, efforts were made to obtain copies of the notes. These efforts were thwarted by the government's post-trial assertion of the work-product doctrine, which the District Court upheld.

The government agent present at the meetings failed to make a record of the meeting, thus the government deliberately failed to produce a document that it would have been required to produce to the Petitioner during discovery. By determining that only the attorney present would take notes, the government effectively concealed from Petitioner that these interviews were even occurring. Not once during discovery did the government assert a claim of privilege over any of its documents, thus continuing to conceal the existence of the meetings from Petitioner. If not for the civil lawsuit filed by Ms. Arrendale, the government would have succeeded in preventing Petitioner from ever knowing these meetings had occurred.

However, once the existence of the meetings was brought to the attention of the trial court, the court was under an obligation to ensure that Petitioner was provided with any and all evidence falling within the scope of Brady, *supra*, including impeachment material. For the government agent to refuse to memorialize the interviews, and for the government attorneys to claim privilege with respect to the interviews, is a deliberate effort by the government to deny

Petitioner of his due process rights under Brady and its progeny. The work-product doctrine cannot "trump" Petitioner's fundamental right to a fair trial.

In the only case Petitioner has found where the government deliberately failed to keep records that would have to be produced during discovery, the United States District Court for the District of Colorado dismissed the charges against the defendant. *See*, United States v. Van Nuys, 707 F.Supp. 465 (D.Colo. 1989). Although Petitioner discussed Van Nuys, *supra*, in his briefs before both the District Court and the Court of Appeals, neither court distinguished Van Nuys from the case at bar, failing to explain how Petitioner's due process rights were protected by the government's conduct.

ARGUMENT 3

By determining that the Petitioner had sufficiently impeached a witness without the withheld evidence allows the appellate court to substitute their judgment for that of the ultimate fact finder - - the jury.

The District Court denied Petitioner's Motion for New Trial finding that the exculpatory evidence withheld by the government was not newly discovered. The Court of Appeals determined that the evidence was newly discovered and constituted Brady material. However, the Court of Appeals, without any evidence of the substance of the undisclosed meetings apart from the deposition testimony of Ms. Arrendale and SA Fluhart, upheld the District Court's denial of Petitioner's Motion for New Trial, although the Court of Appeals found the newly discovered evidence to be

exculpatory. This conclusion was reached based solely upon the deposition testimony in an unrelated civil proceeding and the affidavits filed by the government. In each case where there was a conflict between Ms. Arrendale's version of the facts and the government's version, the court resolved the conflict in favor of the government - - all without the benefit of a hearing.

The Court of Appeals specifically found the withheld Brady evidence:

> [w]ould have allowed Appellants to challenge the existence of the manuals Arrendale allegedly showed Appellants and the credibility of the manuals introduced at trial as government exhibits 86B and 86D. . . . [and] would have helped Appellants impeach Arrendale's testimony both by challenging Arrendale with her prior inconsistent statements and by questioning whether Arrendale's testimony was biased.

App. A at 11a. Despite this finding, the Court of Appeals determined Petitioner was able to sufficiently impeach Arrendale without the withheld Brady material. Such a determination denied Petitioner of his due process rights by taking the issue of Ms. Arrendale's credibility out of the hands of the jury.

Petitioner has a constitutional right to cross-examine any witness the government presents at trial in order to fully inform the jury prior to the jury reaching a decision on the issue of that witness' credibility. For the Court of Appeals to determine that the Petitioner had ample opportunity to impeach a witness presupposes that the jury completely

discounted the testimony of the witness *and* found Petitioner guilty. No one, including the Court of Appeals, knows what determination the jury made as to the credibility of Ms. Arrendale's testimony.

At least one jurisdiction has found that commentary by a court on a witness' credibility, made during the charge to the jury, "[d]eprived the defendant of his right to have questions of credibility decided by a jury." United States v. Anton, 597 F.2d 371 at 372 (3d Cir. 1979). While in this case the right was not taken away from Petitioner prior to the jury's deliberations, the Court of Appeals' determination that Ms. Arrendale had been sufficiently impeached at trial effectively had the same result. The jury reached its verdict without being allowed to consider Ms. Arrendale's prior inconsistent statements, or the fact that she had been shown government's exhibits 86B and 86D and stated positively that neither of these was the manual she allegedly showed to the Clinitec executives. For the Court of Appeals to replace the judgment of the jury with that of its own deprived Petitioner of his due process rights under the Constitution.

CONCLUSION

Petitioner was deprived a fair trial in the District Court as a consequence of the government's failure to notify the Court that witnesses called by the government had given false testimony. At the time it failed to so notify the Court, the government was aware that it had intentionally refused to provide Petitioner with the notes taken by government attorneys during their interviews of these witnesses. After Petitioner's trial -- when the existence of the exculpatory material was first discovered -- the trial court refused to allow Petitioner any opportunity to demonstrate that the

government's refusal to produce exculpatory materials had a "material" impact on the outcome of the trial. Both the District Court and the Court of Appeals used the government's assertion of the work-product doctrine as a justification for depriving Petitioner of his right to confront the government's witnesses with their prior inconsistent statements. The Petitioner was thus deprived of a fair trial, whose outcome is worthy of confidence.

The Petition for a Writ of Certiorari should be granted.

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APPENDIX A

NOT RECOMMENDED FOR PUBLICATION

UNITES STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed April 12, 2000]

Nos. 98-3882, 98-3883, 98-3884

UNITED STATES OF AMERICA,)
Plaintiff-Appellee,)
)
-)
v.)
)
NHML, INC., dba CLINITEC,)
COLIN E. BAYLISS,)
RAYMOND H. PINKERTON,)
Defendants-Appellants.)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

CORRECTED OPINION

BEFORE: NELSON and SILER, Circuit Judges; QUIST, District Judge.*

GORDON J. QUIST, District Judge. NHML dba Clinitec Laboratory ("Clinitec"), Colin E. Bayliss ("Bayliss"), Clinitec's owner, and Raymond H. Pinkerton ("Pinkerton"), Clinitec's President, were indicted on 44 counts. The counts included conspiracy to defraud the United States under 18 U.S.C. § 371, making false, fictitious, or fraudulent claims under 18 U.S.C. § 287, making false statements to the Department of Health and Human Services under 18 U.S.C. § 1001, and giving illegal kickbacks under 42 U.S.C. § 1320a-7b. The indictment was based on alleged false claims filed by Clinitec for glucose blood stick tests and kickbacks allegedly given to nursing homes to secure contracts to perform the glucose tests. Appellants were convicted of all counts by a jury on July 25, 1997. Appellants Bayliss and Pinkerton were each sentenced to prison for 63 months and were each ordered to pay restitution in the amount of $1,665,000. Clinitec was similarly ordered to pay restitution in the amount of $1,665,000.

Appellants filed a motion for a new trial which was denied, without a hearing, after *in camera* review of the evidence by the district judge. Appellants have timely appealed to this Court.

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* The Honorable Gordon J. Quist, United States District Judge for the Western District of Michigan, sitting by designation

FACTS

Bayliss opened Clinitec in 1990 for the purpose of serving the laboratory needs of his nursing home clients in related businesses and with a goal of contracting with 200 nursing homes. Bayliss hired Pinkerton to be President of Clinitec and run its daily operation while Bayliss oversaw finances and hiring. Pinkerton had previously worked at a similar laboratory servicing nursing homes, Suburban Medical Laboratory ("Suburban"). Bayliss also hired Kurt Rump from Suburban. Together, Rump and Pinkerton implemented a blood glucose program similar to a program they had previously administered for Suburban.

Under the glucose program, Clinitec provided nursing homes with the necessary glucose testing supplies without cost, and the nursing home staffs performed the glucose blood tests and kept logs of the test results. Clinitec then used these nursing home generated logs to bill Medicare and Medicaid for the glucose tests. Each glucose test claim filed with Medicaid included a certification by Clinitec that it, Clinitec, had performed the glucose test.

During the period of time that Clinitec was billing for the tests, several Clinitec employees voiced concerns that Clinitec could not legally bill the government for tests Clinitec had not actually performed. Wendy Arrendale ("Arrendale") showed both Sam Shaheen, Clinitec's vice president of operations, and Pinkerton a section of what Arrendale believed to be a Medicare manual stating that Clinitec could not bill for tests performed by someone other than an agent of Clinitec. (J.A. 789-90.) Barb Marting ("Marting") testified at trial that she approached Pinkerton and operations manager

Rod McCauley ("McCauley") with her concerns that billing for the glucose tests was illegal. (J.A. 812.) Finally, McCauley testified that he discussed concerns about the legality of billing for the glucose tests with both Pinkerton and Bayliss. (J.A.821-22.)

Bayliss and Pinkerton consulted Hope Foster ("Foster"), a health care attorney, with respect to the glucose program. Foster informed Bayliss and Pinkerton that giving free testing and disposal supplies to nursing homes might be an illegal kickback. Based on this advice, Bayliss and Pinkerton informed Foster that they would begin charging a minimal fee. However, Bayliss and Pinkerton did not discuss with Foster the legality of billing Medicare and Medicaid for the glucose tests.

In an effort to persuade several Columbus nursing homes to contract with Clinitec, Clinitec, at the direction of, among others, Bayliss and Pinkerton, paid Dr. H.T. Villavecer ("H.T.") more than $72,000 in consulting fees. H.T.'s son, Virgil, was given $30,000 for "standby oxygen," including payments made after Virgil sold his oxygen business. Shortly after the payments began, the Columbus nursing homes of which H.T. was a medical director contracted with Clinitec.

In addition, Bayliss offered to pay Renee Reber ("Reber") $1,000 if she could persuade her new employer to contract with Anderson Medical Services, a company owned by Bayliss, after Reber left Anderson Medical Services. Reber declined Bayliss' offer.

Clinitec, Bayliss, and Pinkerton appeal as a result of the jury verdicts against them. Altogether, Appellants cite fifteen grounds for appeal, each discussed below.

ANALYSIS

I. *District Court's Decision Denying Appellants' Motion for Entry of Judgment of Acquittal or in the Alternative Motion for a New Trial*

A district court's denial of a motion for acquittal or a new trial based on a *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963), claim of suppressed exculpatory evidence as in the present case, is reviewed by this Court *de novo* to determine whether the suppressed evidence undermines the confidence in the outcome of the defendant's trial. *See United States v. Miller*, 161 F.3d 977, 987 (6th Cir. 1998) (citing *United States v. Phillip*, 948 F.2d 241, 249-50 (6th Cir. 1991)), *cert. denied*, 119 S.Ct. 1275 (1999).

The defendant is entitled to a new trial if the defendant shows that the evidence is newly discovered after trial and that the evidence is material. *See Schledwitz v. United States*, 169 F.3d 1003, 1011-12 (6th Cir. 1999). Materiality does not require that the suppressed evidence establish the defendant's innocence or likelihood of an acquittal. *See Schledwitz*, 169 F.3d at 1011-12; *United States v. O'Dell*, 805 F.2d 637, 641 (6th Cir. 1986). Rather, *Brady* materiality requires "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *See Kyles v. Whitley*, 514 U.S. 419, 435, 115 S.Ct. 1555, 1566 (1995) (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383 (1985)).

For *Brady* purposes impeaching evidence is considered exculpatory. *See Kyles*, 514 U.S. at 433, 115 S.Ct. at 1565; *Schledwitz*, 169 F.3d at 1015 (noting that evidence of bias may be used as impeachment evidence). Additionally, the court must evaluate the effect of all exculpatory evidence collectively. *See United States v. Frost*, 125 F.3d 346, 383 (6th Cir. 1997).

This Court will consider each piece of alleged *Brady* evidence under the factors described above and then consider whether Appellants received a verdict worthy of confidence based on the collective effect of suppression of the exculpatory evidence.

A. *Government's Meetings with Arrendale*

1. *New Evidence Discovered After the Trial*

At trial, Arrendale testified that she had shown Pinkerton a Medicare manual stating that Clinitec could not bill for the glucose tests. (J.A. 789-90.) Arrendale further testified that Clinitec had continued to bill for glucose testing after she confronted Pinkerton. (J.A. 790.) Arrendale also testified that she was only interviewed by government agents once, aside from Arrendale's testimony before the Grand Jury and at trial. (J.A. 801.) Arrendale's trial testimony was consistent with her grand jury testimony and the interview summary initially provided by the government. At a deposition in a civil case, however, Arrendale testified that she had been interviewed by government agents numerous times. During those meetings, when shown several manuals by government agents, Arrendale was unable to identify the manual she claimed to have shown to Pinkerton. In addition,

during the meetings Arrendale initially stated that Clinitec had stopped billing for the glucose testing after she confronted Pinkerton.

The government disclosed to Appellants a summary of one meeting with Arrendale. That summary said only that though Arrendale had "diligently attempted to find the manual section . . . She [was] not [] able to find the citation. . . ." (J.A. 410.) The government contends that these statements should have given Appellants notice that Arrendale could not identify the manual. (Gov't. Br. at 20.) These statements, however, merely suggest that Arrendale was unable to find the exact section of the manual she had shown to Appellants. The statements do not clearly suggest that Arrendale was unable to identify the manual itself. As a result of the multiple meetings not disclosed to Appellants and the lack of information in the one summary disclosed, this information is considered newly discovered after the trial. Furthermore, there is nothing to indicate that the information could have been discovered earlier through greater diligence on the part of Appellants.

2. *Materiality of the Evidence*

Medical and hospital care reimbursement programs are very detailed and complex. In addition, the law is not always clear about what is or is not a reimbursable expense or cost. The law does not intend that a person or organization be criminally prosecuted for ignorance or good faith mistaken legal judgments regarding what is or is not a reimbursable expense or cost. Therefore, the law requires that a person knowingly violate the law. "Knowingly" in the context of medical reimbursement means not only that the defendant

knows he submitted a claim, but also that the defendant knows the claim is false and that he is not entitled to payment on it. *See United States v. Blazewicz*, 459 F.2d 442, 443 (6th Cir. 1972) (per curiam); *cf.* 41 C.F.R. § 30211.10(c) (noting that 18 U.S.C. §§ 287 and 1001 are violated where a party knowingly presents false claims to a government agency). Therefore, the issue of what Arrendale showed and told Appellants is important. The government had a duty to give Appellants all available information on the issues of intent and bias. *See Schledwitz*, 169 F.3d at 1011, 1015.

Appellants allege that the government failed to disclose numerous meetings between Arrendale and government agents. These undisclosed meetings will each be described individually so that the scope of the government's failure to disclose may be understood and to provide a base from which to evaluate the materiality of the withheld evidence.

Arrendale claims to have first met with Special Agent Bettac prior to Arrendale's Grand Jury testimony, when Bettac served Arrendale with a Grand Jury subpoena. (J.A. 254-56.) However, Bettac claims that he met Arrendale for the first time at Arrendale's Grand Jury appearance and never served her with a subpoena. (Bettac Aff. ¶ 3, J.A. 383.) Instead, Bettac claims that Special Agent Paul Myers served Arrendale and that Myers did not interview Arrendale at that time. (*Id.*) The fact that the government would likely have been able to prove that Myers served Arrendale from proof of service documents decreases the materiality of this alleged meeting between Bettac and Arrendale.

The parties agree that Arrendale and Bettac, along with a government lawyer, met approximately forty-five

minutes before Arrendale testified to the Grand Jury, on April 24, 1996. (J.A. 258-62; Bettac Aff. ¶ 5, J.A. 383.) Arrendale claims she was asked to identify a 1991 Medicare manual as the manual containing the provisions she had shown to Pinkerton. (J.A. 7265-68.) Arrendale further claims to have been asked to confirm that a Medicaid manual she was shown also contained the provisions regarding reimbursement. (*Id.*) However, the government claims that Arrendale was not shown any manuals prior to her Grand Jury testimony. (Bettac Aff.¶ 5, J.A. 383.)

Bettac's summary of the April 24, 1996, meeting states that Arrendale believed Clinitec stopped billing for glucose testing shortly after Arrendale showed Pinkerton the provision of the manual. (J.A. 386.) This statement directly contradicts Arrendale's trial testimony. At trial Arrendale testified that Appellants continued to bill for glucose testing after she had shown Appellants the Medicare manual. (J.A. 789-90.) Arrendale's statement may be of little significance based on Appellants' records showing continued billing. However, had Bettac's summary of the meeting been disclosed, Appellants could have used the evidence to impeach Arrendale.

Arrendale and Bettac next met on September 6, 1996. According to Bettac, at that meeting he showed Arrendale two Medicaid manuals (Trial Exs. 86B & 86D), as well as portions of a Medicare Part B Policy Manual, 1990. (J.A. 973-75, 978.) Arrendale told Bettac that none of the three manuals shown to her by Bettac were the manuals Arrendale showed Appellants. Nonetheless, the two Medicaid manuals shown to Arrendale were introduced at trial as manuals similar to those which Arrendale showed Appellants.

Evidence of this interview, had it been fully disclosed, would have allowed Appellants to question whether the manuals submitted by the government were actually those shown by Arrendale to Appellants.

Arrendale's next contact with the government was on April 7, 1997, when Arrendale initiated conversations with Special Agents Bettac and Fluhart. During these conversations, Arrendale told Bettac and Fluhart that Bayliss had threatened to fire Arrendale unless she changed her trial testimony. (J.A. 417.) However, reports of these conversations were produced by the government and, therefore, are not at issue.

The government next interviewed Arrendale at her home on April 9, 1997. (Nearhood Aff. ¶ 2, J.A. 376.) During this interview Arrendale was again shown the two Medicaid manuals introduced at trial, government exhibits 86B and 86D, and Arrendale was again unable to identify the provisions shown to Appellants. (*Id.* ¶ 3.) Evidence of this meeting would have provided Appellants with more evidence questioning whether government exhibits 86B and 86D were actually those provisions shown by Arrendale to the Appellants.

Arrendale met with a government lawyer and Special Agent Fluhart on June 24, 1997. (*Id.* ¶ 5, J.A. 376; J.A. 291-92.) Arrendale was not shown any Medicare or Medicaid manuals at this meeting. Therefore, this meeting is only material for impeaching Arrendale's testimony that she was only interviewed by government agents on one occasion. (J.A. 801.)

Arrendale's next meeting with the government was on July 21, 1997, before Arrendale testified in Appellants' criminal trial. Arrendale alleges that she gave the government attorney a copy of her civil complaint against Appellants at this meeting. (J.A. 295). The government admits being shown a copy of Arrendale's complaint, but denies having read or retained a copy of Arrendale's complaint. (Nearhood Aff. ¶ 6, J.A. 378.) Appellants could have used this evidence to impeach Arrendale with respect to bias Arrendale's civil suit may have created in her testimony against Appellants.

Government disclosure of summaries of these meetings would have provided Appellants with exculpatory evidence. First, the summaries would have allowed the Appellants to challenge the existence of the manuals Arrendale allegedly showed Appellants and the credibility of the manuals introduced at trial as government exhibits 86B and 86D. Second, evidence of the meetings would have helped Appellants impeach Arrendale's testimony both by challenging Arrendale with her prior inconsistent statements and by questioning whether Arrendale's testimony was biased.

Appellants had sufficient opportunity, without the withheld evidence, to impeach Arrendale's testimony. As it turns out, a proper impeachment merely would have shown that Arrendale misidentified the source of the publication giving Pinkerton the knowledge on the issue of intent. It also appears to this Court that Appellants were able to argue effectively during closing arguments that the official government manuals did not exist. (J.A. 891 & 899.) Additionally, as noted by the district court, Appellants were alerted to Arrendale's civil suit by a newspaper article published prior to the conclusion of Appellants' trial. (J.A.

450-52, 439.) Appellants, therefore, had sufficient opportunity to cross-examine Arrendale with respect to bias created by Arrendale's civil suit against Appellants.

For these reasons, this Court has confidence in the verdict against Appellants.

B. ***Marting Interview Notes***

Based on its *in camera* review of Marting's interview files, the district court found her testimony to be fully disclosed in Marting's grand jury testimony. (J.A. 461.) Marting testified to voicing concerns to McCauley and Pinkerton that Clinitec should not be billing for glucose testing. (J.A. 809-18.) This testimony was available to Appellants in Marting's grand jury testimony. Therefore, not receiving government summaries containing identical information was not prejudicial and it was not new evidence.

C. ***McCauley Interview Notes***

Appellants contend that a note written by McCauley in the margin of a statement McCauley adopted as his own is new and prejudicial evidence. The note consisted of the statement, "I don't recall" next to a paragraph in McCauley's adopted statement regarding the reason for Pinkerton's and Bayliss' meeting with Hope Foster. (Gov't. Br. at 29.) At trial McCauley testified to not recalling specifics of the Foster meeting or why it was set up. (J.A. 454.) This testimony does not differ from McCauley's note stating he did not remember the purpose of the meetings. Therefore, the evidence of McCauley's note does not provide new or prejudicial information.

D. *Evidence as a Whole*

To determine whether the district court should have granted an acquittal or a new trial, the Court must look at the evidence as a whole. *See Frost*, 125 F.3d at 383. The district court considered all of the evidence alleged to be exculpatory by Appellants and found that the evidence as a whole did not warrant a new trial. The district court found that any prejudice created by the government's failure to produce interview summaries was not substantial. After a thorough analysis of the evidence as a whole, this Court concurs with the district court.

II. *District Court's Decision Not to Conduct a Hearing on Appellants' Motion for Entry of Judgment of Acquittal or Alternative Motion for New Trial*

Appellants contend that the district court abused its discretion by refusing to grant a hearing before denying the motion for a new trial. The question of whether to decide a motion on the supporting evidence filed with the motion or to hold an evidentiary hearing is within the discretion of the trial court. *See United States v. Hoffa*, 382 F.2d 856, 866 (6th Cir. 1967). A district court's decision not to hold a hearing on a motion for acquittal or a new trial is reviewed by this Court for abuse of discretion. *See Frost*, 125 F.3d at 383. As outlined above, the district court's opinion shows a careful review of the evidence in question and its relation to the case. (J.A. 456-61.) Appellants made their arguments for the motions at oral argument and the district court performed an *in camera* review of the relevant evidence. Accordingly, we hold that the district court did not abuse its discretion in denying an evidentiary hearing on the motion for a new trial.

III. *District Court Decision Denying Appellants' Motion to Dismiss Counts 1 Through 39 and 44 of the Indictment*

Appellants argue that counts 1 through 39 and 44 of the indictment should be dismissed because the conduct charged in the indictment does not constitute filing of false, fictitious, or fraudulent claims under 18 U.S.C. § 287. Appellants' argument rests on the premise that Clinitec did not have to actually perform the glucose tests to bill the government for them. As proof of their claim Appellants present an internal memo from the government, provided during discovery, stating that while there was a Medicaid requirement that a provider bill only for those services it actually provides, there was no corresponding Medicare requirement. (J.A. 97.) In its brief, the government acknowledges this internal memorandum, but notes that it was a preliminary document and is incorrect. In support of this statement the governments looks to the Medicare Carrier Manual § 3060, which provides that "the carrier may pay assigned benefits only to the physician or supplier who furnished the service and may not pay assigned benefits to any other person or organization under a reassignment or . . . under any other arrangement where the other person or organization receives the payment directly." (J.A. 953-54.)

In addition, a Medicaid Handbook was provided to all Ohio providers, and Clinitec had possession of the handbook. (J.A. 971-78, 672-75.) The handbook clearly stated that Medicaid would not pay for a test that a lab had not performed. Clinitec certified with each Medicaid claim filed that Clinitec had rendered the service being reimbursed. (J.A. 969-70, 951-52.) Appellants argue that their

indictments and subsequent convictions are based on the insurer's interpretation of the certification language without regard to what Appellants understood the language to mean.

The certification language signed by Clinitec for each Medicaid claim provided: "This is to certify that I have rendered the above medical services. I understand that payment and satisfaction of this claim will be from federal and state funds and that any false claims, statements, or documents or concealment of a material fact may be prosecuted under applicable federal or state laws." (J.A. 669-70.) The Medicare certification language signed for each claim provided: "I certify that the services shown on this form . . . were personally furnished by me. . . ." (J.A. 713.) The language, for both Medicare and Medicaid, is clear, and it does not require detailed parsing to determine the plain meaning of the language. Clinitec was certifying that, as the laboratory seeking reimbursement, it had performed the tests.

Appellants next contend that § 287 was not violated because under *United States v. Eaton*, 144 U.S. 677, 12 S.Ct. 764 (1892), an offense can only be criminally prosecuted where it arises from a violation of public law. *See id.* at 687-88, 12 S.Ct. at 767. Appellants argue that at most they violated a policy of the insurer, Nationwide. However, the criminal act under § 287 was not submitting the claim, but rather knowingly submitting a false claim to the government. By certifying that they had done the glucose tests and knowingly submitting the falsified certification, Appellants would be guilty of violating § 287.

Finally Appellants argue that the government should have indicted them under 42 U.S.C. § 1320a-7b(a).

However, the government correctly points out that when a defendant's acts violate more than one criminal statute the government has discretion to prosecute him under any of the statutes as long as the choice is not discriminatory. *See United States v. Oldfield*, 859 F.2d 392, 398-99 (6th Cir. 1988). As a result of the above determinations, the district court is affirmed on this point.

IV. *District Court Decision Allowing State Administrative Regulations Regarding Medicare and Medicaid Claims to be Admitted Into Evidence*

Appellants contend that the district court erred when it allowed Ohio state administrative regulations pertaining to Medicare and Medicaid billing by laboratories to be admitted into evidence at trial for the dual purposes of showing Appellants' intent or motive and showing evidence of Medicaid billing policies. A trial court's admission of evidence at trial will be upheld absent proof of a clear abuse of discretion. *See United States v. Bonds*, 12 F.3d 540, 554 (6th Cir. 1993).

Evidence showing violation of civil regulations may not be used to show criminal conduct, but may be used to show motive or intent necessary for criminal activity. *See United States v. Parks*, 68 F.3d 860, 866-67 (5th Cir. 1995). The district judge expressly limited the jury's use of this evidence to these purposes at trial. (J.A. 681-84.) Further, in *United States v. Gold*, 743 F.2d 800 (11th Cir. 1984), the court held that a Medicare manual was "highly relevant" in determining those claims payable under Medicare. *Gold*, 743 F.2d at 815-16. Appellants argue that *Gold* is not applicable in the present case because there was evidence in *Gold* that

Gold had read the regulations in question. However, there is also evidence in the present case that the illegality of making claims for the glucose testing had been brought to the attention of Appellants. Therefore, use of the manual provided to Appellants to determine their motive or intent is relevant regardless of whether there is evidence that Appellants have read the provisions. At trial, Appellants had sufficient opportunity to present evidence that they had not read the regulations or that even if they had, the complexity of the Medicare and Medicaid systems is such that a reading of the regulation might not make the illegality of their payment plan apparent.

Finally, Appellants argue that the manual admitted as evidence was a 1991 manual and, as Clinitec was begun prior to 1991, the manual was irrelevant as to those acts. It is true that a 1991 manual will have no bearing on pre-1991 acts, but that information was all readily available both to the Appellants and to the jurors. Appellants are free to make arguments with respect to when the manual was available.

For the above reasons, the district judge committed no reversible error by admitting the state regulations for the limited purposes of showing intent or motive of Appellants and showing billing policies of Medicaid.

V. *District Court Decision Precluding Appellants From Introducing Evidence of Continued Government Payments After Conclusions that the Claims Were Improper*

Appellants argue that the district court improperly withheld evidence that the insurer, Nationwide, which

accepted Appellants' claims for the glucose testing, learned of Appellants' conduct through a 1992 survey of Clinitec nursing homes and did not inform Appellants that the conduct was illegal until 1994. A trial court's admission of evidence at trial will be upheld absent proof of a clear abuse of discretion. *See United States v. Phillips*, 888 F.2d 38, 40 (6th Cir. 1989).

Had Nationwide learned of Appellants' acts on its own initiative and then acquiesced to Appellants' conduct for two years, Appellant would have a claim that the evidence was relevant to show that their billing practice was not fraudulent or illegal. However, the survey was performed and the information gathered at the request of the Department of Health and Human Services ("HHS") as part of an initial criminal investigation. (J.A. 750-51.) Nationwide lacked intent to harm or deceive Appellants. Nationwide was merely cooperating with the government in a criminal investigation and accepting the claims as it had previously.

The knowledge of the government agent accepting a false claim is irrelevant to a violation of § 287. Further, paid claims do not shield providers presenting false claims from criminal prosecution. Therefore, acceptance of a claim by Nationwide that it knows to be false is not relevant to any defense Appellants may have.

The district court's decision excluding the evidence does not meet the standard of abuse of discretion. Therefore, the district court's ruling will be upheld.

VI. *District Court Jury Instruction on the Safe Harbor Provisions of the Kickback Statute*

Appellants contend that the district court erred by not allowing them to submit to the jury evidence regarding the Clinical Laboratory Improvement Act of 1988 ("CLIA") requiring Appellants to have a Clinical consultant on their staff. *See* 42 C.F.R. §§ 493.1403 - 1425. This provision has direct relevance with respect to whether consulting fees paid to H.T. were a kickback.

The fundamental problem with the Appellants' argument is that evidence of the CLIA was allowed. Appellants raised the issue at trial and the jury was instructed on it. (J.A. 892-94, 900-01, 912-13.) Therefore, the district court's decision stands.

VII. *District Court Enhancement of Bayliss' and Pinkerton's Sentences Under U.S.S.G. § 3B1.1(a)*

The district court enhanced Bayliss' sentence, pursuant to U.S.S.G. § 3B1.1(a), for his role in organizing the illegal glucose testing program. Bayliss contends that the district court's enhancement of his sentence was unsubstantiated and reversible. The Court reviews legal conclusions with respect to the Sentencing Guidelines *de novo*, but facts are reviewed under a clearly erroneous standard. *See United States v. Gort-DiDonato*, 109 F.3d 318, 320 (6th Cir. 1997).

Pinkerton adopts Bayliss' argument by reference. However, the application of sentencing guidelines requires separate factual determinations for each party which are not addressed in Pinkerton's brief. Therefore, Pinkerton is

considered to have waived his right to make this argument and only Bayliss' argument will be considered. *See United States v. Elder*, 90 F.3d 1110, 1118 (6th Cir. 1996).

To qualify for a four point enhancement under § 3B1.1, Bayliss must have been, "an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive. . . ." U.S.S.G. § 3B1.1(a). Application Note 1 defines "participant" as "a person who is criminally responsible for the commission of the offense, but need not have been convicted." U.S.S.G. § 3B 1.1 applic. note 1. In determining whether there are five participants, a defendant may be counted as one of the five. *See United States v. Loggins*, Nos. 98-5657, 98-5744, 1999 WL 1204793, at *5 (6th Cir. Dec. 7, 1999); *United States v. Carroll*, No. 95-5528, 1996 WL 266425, at *5-6 (6th Cir. May 17, 1996) (per curiam); *United States v. Colletti*, 984 F.2d 1339, 1346 (3d Cir. 1992); *United States v. Marshall*, 976 F.2d 658, 658-59 (11th Cir. 1992) (per curiam); *United States v. Fells*, 920 F.2d 1179, 1182 (4th Cir. 1990).

The district court found that Bayliss established Clinitec, and subsequently hired Pinkerton and Rump to, among other things, create the glucose billing program which Pinkerton and Rump had developed at another company. (J.A. 945-46.) Clinitec employed Arrendale, Marting, and McCauley, each of whom eventually expressed concerns that the glucose testing claims were illegal either to Bayliss or to Pinkerton, who ran Clinitec for Bayliss. (J.A. 788-90 (Arrendale), 812 (Marting), 821-22 (McCauley).) Arrendale testified that she had shown Pinkerton a Medicare manual stating that Clinitec could not bill for the glucose tests. (J.A. 788-90.) Further, the district court found that there was

testimony that McCauley had been warned by Bayliss not to bring up the claims issue with Foster. (J.A. 945-46.) Generalized suspicion regarding the glucose testing program is not sufficient to make one a participant pursuant to § 3B1.1(a). *See United States v. Lewis*, 68 F.3d 987, 989 (6th Cir. 1995). However, the evidence shows that Bayliss, Pinkerton, Rump, Arrendale, and McCauley were aware the glucose testing program was illegal, and to violate 18 U.S.C. § 287 one need only submit a medicare claim to the government knowing that the claim is false. *See United States v. Campbell*, 845 F.2d 1374, 1381-82 (6th Cir. 1988); *cf.* 41 C.F.R. § 302-11.10(c) (noting that 18 U.S.C. §§ 287 and 1001 are violated where a party knowingly presents false claims to a government agency); (J.A. 550-54 (Bayliss and Pinkerton), 616-17 (Rump), 788-90 (Arrendale), 945-46 (McCauley).) Based on this evidence, the district court found as a matter of fact that "there were at least five persons who could have been . . . prosecuted in this case," presumably Bayliss, Pinkerton, Rump, Arrendale, and McCauley. (J.A. 945-46.); *see also Lewis*, 68 F.3d at 989-90; *United States v. Cyphers*, 130 F.3d 1361, 1363 (9th Cir. 1997) (distinguishing *Lewis* on the grounds that the alleged participants in *Lewis* were only unwittingly involved in Lewis' crimes). As a result, the district court's finding was not clearly erroneous.

Bayliss cites *United States v. Torres*, 53 F.3d 1129 (10th Cir. 1995) for the proposition that his position as owner of Clinitec is too far removed from the criminal activity to be considered organizing or leading. In *Torres* the enhancement was overturned because the district court had not made sufficient findings of connections between the members of the conspiracy and the defendant to constitute organizing or leading. *See id.* at 1142-43. However, Bayliss started

Clinitec and directly or indirectly hired all of the participants. In *Torres* the other individuals had not been shown to be in the employ of the defendant or otherwise directly under his control. *See id.* at 1143. As a result, the present case is clearly distinguished from *Torres*.

Bayliss raises the same claims with respect to the § 3B1.1(a) enhancement of the kickback claims. Here the trial court found that Jones, McCauley, Baker, Pinkerton, and Bayliss were all involved in arranging the contracts. Bayliss contends that he should not fall under the enhancement because he only attended the meeting where the contract was signed, he did not initiate the discussions with the Villavecers. There is no requirement in § 3B1.1(a) that the defendant initiate the activity. Bayliss must only lead or organize the activity. The district court had a sound basis for finding that Bayliss led the activity. When the owner of a company is present at a meeting and acquiesces in a contract that constitutes a kickback, he is leading, even if he does not initiate or sign the contract. Bayliss' mere presence at the meeting and acceptance of the contract constitute leading the kickbacks. In addition, there is at least some evidence that each of the individuals named by the district court was involved in contracting with the Villavecers. Therefore, the district court's factual basis for the enhancement was not clearly erroneous and is sustained.

VIII. *District Court's Decision Not to Depart Downward From the Sentencing Guidelines*

Appellants contend that the district court committed reversible error by refusing to depart downward from the enhancement under U.S.S.G. § 2F1.1 for the amount of loss

and for doing so without stating the court's reasoning. This argument is that the loss overstates the seriousness of the offense. This court reviews district court factual findings with respect to loss under a clearly erroneous standard. *See United States v. Brown*, 151 F.3d 476, 489 (6th Cir.), *cert. denied*, 119 S. Ct. 560 (1998). However, we consider the definition of "loss" to be a legal question which is reviewed de novo. *Id.*

Appellants argue that the amount of loss should have been reduced by the value of the testing materials provided by Appellants to the nursing homes and by the amount of claims collected after the government became aware of Appellants' improper claims. However, Medicare and Medicaid policy provided that a laboratory could only bill for testing materials provided to patients in their homes. Equipment provided to nursing home residents is not reimbursed because nursing homes are expected to provide the necessary materials and the nursing homes receive reimbursement for these materials through general payments. (J.A. 735-36.) The district court heard extensive testimony with respect to these facts and adopted this reasoning in its decision not to depart from the guidelines. (J.A. 937-44) The district court's factual determination that testing materials could not offset the loss to the government because the government would not regularly reimburse for the materials is sound.

Further, a district court's decision not to depart from a guideline range is not reviewable where the court is aware of its discretion to depart from the guideline. *See United States v. Brown*, 66 F.3d 124, 128 (6th. Cir. 1995) (citing *United States v. Hamilton*, 949 F.2d 190, 192-93 (6th Cir.1991)). The district court was aware that it could

exercise its discretion but chose not to do so. The district court heard from counsel with respect to the issue of departure. (J.A. 937-39.) Therefore, Appellants' motion for remand is denied.

IX. *District Court Decision Precluding Pinkerton From Cross-Examining Medicare and Medicaid Expert Witness Bock*

Pinkerton claims that the district court committed reversible error by precluding him from cross-examining Galen Bock, the chief of the Bureau of Medical Systems Administration for the Ohio Department of Human Services, with respect to whether nursing homes are allowed to administer glucose testing. Absent clear abuse of discretion, a trial court's admission of evidence at trial will be upheld. *See Phillips*, 888 F.2d at 40. Pinkerton contends that Appellants set up their claims program in an effort to allow nursing homes to do glucose testing and not to defraud the government. Pinkerton's claim may or may not have merit, however, the basis of the government's claims is that Appellants made fraudulent claims to the government and gave kickbacks in the form of free testing equipment to the nursing homes and consulting fees to H.T. Whether or not the nursing homes were allowed to perform the tests has no bearing on the issue of whether Appellants submitted fraudulent claims to an agent of the government. Therefore, the district court did not abuse its discretion in refusing to allow Pinkerton's cross-examination.

X. *District Court's Refusal to Allow Pinkerton to Question Witness Villavecer With Respect to CLIA Regulations*

During cross-examination of Dr. H.T. Villavecer ("H.T.") Pinkerton attempted to ask H.T. questions about the meaning of CLIA regulations. Pinkerton did not establish H.T. to be an expert on the regulations. (J.A. 567-69.) In fact, H.T. was not familiar with the statute in question. (*Id.*) At no point in the trial did Pinkerton attempt to qualify a witness as an expert to discuss the statute and its similarity to Appellants' contract with H.T. In addition, the statute as it relates to the contract with H.T. was brought to the attention of the jury during trial as shown in Section VI., above. Therefore, this Court finds no abuse of discretion.

XI. *District Court's Refusal to Allow Pinkerton to Question Government Witnesses With Respect to Billing Practices of Other Laboratories*

Pinkerton claims that he was barred from questioning certain witnesses regarding practices of other laboratories with respect to glucose testing. Pinkerton argues that the purpose of this line of questioning was not to excuse Appellants' conduct by showing similar misconduct that was not indicted, but to show that Appellants' practice of giving free testing equipment was a standard business practice instead of a kickback scheme.

At trial, the district judge heard extensively from both sides on this issue. (J.A. 630-44.) Ultimately, the district court allowed Pinkerton to cross-examine Rump with respect to the practices of other laboratories. (J.A. 641.) In addition,

the district court instructed the jury that the testimony could not be used to draw an inference of legality. (J.A. 644.) Following this instruction Pinkerton cross-examined Rump with respect to glucose testing procedures of other laboratories. (J.A. 645-46.) Had Pinkerton wanted to recall other witnesses to speak to these issues, he could have asked for leave of the court to do so. However, he did not.

The district court allowed the line of questioning Pinkerton wanted. Therefore, there is no abuse of discretion.

XII. *District Court Decision Allowing Testimony of Virgil and H. T. Villavecer Over Appellants' 18 U.S. C. § 201(c)(2) Objection*

The Villavecers were given plea agreements presumably in exchange for their testimony at trial. As a result, Pinkerton contends that the government violated 18 U.S.C. § 201(c)(2) which subjects "whoever" offers or promises something of value to another in exchange for testimony at trial to criminal penalties. However, there is clear and overwhelming precedent in this Court and from the Tenth Circuit that "whoever" does not refer to United States Attorneys. *See United States v. Ware*, 161 F.3d 414, 425 (6th Cir. 1998), *cert. denied*, 119 S. Ct. 1348 (1999); *United States v. Singleton*, 165 F.3d 1297, 1301-02 (10th Cir. 1999) (en banc), *cert. denied*, 119 S. Ct. 2371 (1999). As a result, § 201(c)(2) is clearly inapplicable in the present case and Pinkerton's appeal is denied on this issue.

XIII. *District Court's Loss Calculation for Appellant*

Pinkerton claims that the district court's loss calculation for purposes of sentencing under U.S.S.G. § 2F1.1 was incorrect because the court used a gross loss instead of a net loss calculation. Pinkerton's argument is premised on the fact that all tests performed were medically necessary and therefore Medicare or Medicaid had a duty to pay for the tests. However, Pinkerton misses the fundamental point made by the district court. Clinitec fraudulently certified to the government that it was billing for tests it had performed. Medicare's and Medicaid's obligations were to pay providers for medically necessary tests performed by the providers. As a result, the government's loss is the entire claim amount. Nursing homes were paid separately as part of a monthly reimbursement. For this reason and those stated above at Section XIII, in Appellants' similar argument, the district court is upheld.

XIV. *District Court Decision Not to Impose Sanctions for Violations of Fed. R. Crim. P. 16(a)*

Appellant Clinitec requests that this court sanction the government for its violation of Fed. R. Crim. P. 16(a)(1)(A), requiring the government to provide Appellants with all statements made by Appellants' employees, current or former. As outlined above at Section I, the district court found that some of the suppressed evidence was material. However, the district court also found that the violations did not prejudice Appellants because the information was all otherwise available to Appellants or brought out by Appellants during trial.

Under Fed. R. Crim. P. 16(d)(2) a court has broad discretion in determining appropriate sanctions for violation of Rule 16(a). Appellant requests that we reverse the jury's verdict or in the alternative grant Appellants a new trial. This Court will only reverse a jury's verdict when the nondisclosure at issue has prejudiced Appellants' substantial rights. *See United States v. Phillip*, 948 F.2d 241, 251 (6th Cir. 1991). Further, district court decisions under Rule 16 are reviewed for abuse of discretion. *See id.* at 250. As discussed above at Section I, Clinitec's substantial rights were not prejudiced and the district court did not abuse its discretion in any of its Rule 16 holdings. Therefore, the district court decision not to impose sanctions is upheld.

XV. *District Court Decisions With Respect to Appellant Clinitec's Sixth Amendment Claims*

Appellant Clinitec contends that the government violated its Sixth Amendment right to counsel by contacting Arrendale and Marting post-indictment. A corporation does have a right to counsel which attaches after the corporation has been indicted. *See United States v. Rad-O-Lite of Philadelphia, Inc.*, 612 F.2d 740, 743 (3d Cir. 1979) (holding that a corporation has a Sixth Amendment right to counsel); *Massiah v. United States*, 377 U.S. 201, 84 S. Ct. 1199 (1964) (holding that Sixth Amendment right to counsel attaches at defendant's indictment). However, in *United States v. Morrison*, 449 U.S. 361, 101 S. Ct. 665 (1981), the Supreme Court held that, "[a]bsent [prejudicial] impact on the criminal proceeding, however, there is no basis for imposing a remedy in that proceeding, which can go forward with full recognition of the defendant's right to counsel and to a fair trial." *See id.* at 365, 101 S. Ct. at 669. In *Morrison*, the

Court found Sixth Amendment violations, but provided no remedies because it was unable to find any prejudice stemming from the violations. *See id.* at 366-67, 101 S.Ct. at 669.

In Section I of this opinion, the Court upheld the district court's determination that the government contacts with Arrendale and Marting alleged to be in violation of Clinitec's right to counsel did not create prejudice sufficient to question the reliability of the verdict against Appellants. As a result, even presuming that Arrendale and Marting are employees that fit within Clinitec's privilege, Clinitec has no additional remedy available. Therefore, the district court decision is upheld.

CONCLUSION

For all of the reasons stated above, each of Appellants' arguments on appeal is rejected and the judgment of the district court stands.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed June 3, 1998]

No. 5:96 CR 331

UNITED STATES OF AMERICA, *Plaintiff*

v.

NHML, INC., dba Clinitec Laboratory COLIN E. BAYLISS and RAYMOND H. PINKERTON, *Defendants*

ORDER

On October 8, 1996, Defendants NHML, Inc., dba Clinitec Laboratory ("Clinitec"), Colin E. Bayliss ("Bayliss"), and Raymond H. Pinkerton ("Pinkerton") were indicted on numerous charges. Defendants Hermenegildo T. Villavecer and Virgil Villavecer were charged in Count 40 of that same indictment. Both Villavecers were charged in Count 40 with violating 18 U.S.C. Sec. 371- Conspiracy to Defraud the United States and plead guilty to that count on

October 31, 1996. The remaining Defendants were convicted by a jury on July 25, 1997 of all counts alleged against them. Specifically, Clinitec was found guilty of 39 counts of filing false claims against Medicaid and Medicare by billing for the costs of blood glucose stick tests which Clinitec employees did not perform, in violation of 18 U.S.C. Sec. 287, one count of conspiracy to defraud the United States, in violation of 18 U.S.C. Sec. 371, and two counts of providing improper kickbacks, in violation of 42 U.S.C. Sec. 1320a-7(b)(1)(A); Bayliss was found guilty of 39 counts of filing false claims against Medicaid and Medicare, in violation of 18 U.S.C. Sec. 287, one count of conspiracy to defraud the United States, in violation of 18 U.S.C. Sec. 371, three counts of providing improper kickbacks, in violation of 42 U.S.C. Sec. 1320a-7(b)(1)(A), and one count of making a false statement to the Department of Health and Human Services, in violation of 18 U.S.C. Secs. 1001 and 1002; and Pinkerton was found guilty of 39 counts of filing false claims against Medicaid and Medicare, in violation of 18 U.S.C. Sec. 287, one count of conspiracy to defraud the United States, in violation of 18 U.S.C. Sec. 371, two counts of providing improper kickbacks, in violation of 42 U.S.C. Sec. 1320a-7(b)(1)(A), and one count of making a false statement to the Department of Health and Human Services, in violation of 18 U.S.C. Secs. 1001 and 1002.

Pending before the court are the following motions: 1) Defendants' Motion For Reciprocal Discovery, 2) Defendants' Motion For Entry of Judgment of Acquittal or Alternative Motion For a New Trial pursuant to Fed.R.Crim.P. 33, 3) Defendants' Motion For Order For Plaintiff to File Privilege Log, 4) Defendants' Motion For Order Excluding Witnesses, 5) Defendants' Motion For an

Extension of Time to File Reply Brief in Support of Defendants' Motion for Judgment of Acquittal, 6) Defendants' Motion For Order to Show Cause, 7) Defendants' Motion For Order of Issuance of Rule 17(c) Subpoena, 8) Plaintiff's Motion to Quash Defendants' Motions for Exclusion and Development of Privilege Log, 9) Defendants' Motion to Continue Hearing On Motion For Entry of Judgment of Acquittal and/or New Trial and Sentencing, and 10) Plaintiff's Motion For an Order to Remove Grand Jury Material. The court makes the following rulings:

1) Defendants' Motion For Reciprocal Discovery (docket no. 25) which was filed on March 14, 1997, but not previously ruled on is denied as moot in light of the discovery already accomplished;

2) Defendants' Motion For Entry of Judgment of Acquittal or Alternative Motion For a New Trial pursuant to Fed.R.Crim.P. 33 (docket no. 102) is denied;

3) Defendants' Motion For Order For USA to File a Privilege Log (docket no. 119) is denied in light of the fact that the court finds that Defendants are not entitled to disclosure of the attorneys' or agents' notes from Plaintiff's investigative files;

4) Defendants' Motion For Order Excluding Witnesses (docket no. 120) is denied as moot as explained at the December 4, 1997 hearing;

5) Defendants' Motion For an Extension of Time to File Reply Brief in Support of Defendants' Motion for Judgment of Acquittal (docket no. 123) is granted;

6) Defendants' Motion For Order to Show Cause (docket no. 124) is denied as moot as explained at the December 4, 1997 hearing;

7) Defendants' Motion For Order of Issuance of Rule 17(c) Subpoena (docket no. 125) is conditionally denied as explained at the December 4, 1997 hearing;

8) Plaintiff's Motion to Quash Defendants' Motions for Exclusion and Development of Privilege Log (docket no. 127) is denied as moot as explained at the December 4, 1997 hearing;

9) Defendants' Motion to Continue Hearing On Motion For Entry of Judgment of Acquittal and/or New Trial and Sentencing (docket no. 130) is granted;

10) Plaintiff's Motion For an Order to Remove Grand Jury Material (docket no. 140) is granted.

I.

Defendants ask the court to enter a judgment of acquittal with respect to Count 1 through 41. Fed. R. Crim. P. 29(c) provides:

> If the jury returns a verdict of guilty. . . a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. . . .

The verdict in this case was returned on July 25, 1997; Defendants' motion for entry of judgment of acquittal was filed on October 7, 1997. In Carlisle v. United States, 116 S.Ct. 1460 (1996), the Supreme Court held that a district court has no authority to grant a untimely motion for judgment of acquittal. Consequently, the court lacks jurisdiction to grant a judgment of acquittal. Defendants contend, however, that irrespective of Fed.R.Crim.P. 29(c)'s time limitations, the court is empowered to enter a judgment of acquittal pursuant to Fed.R.Crim.P. 16(d)(2), which provides in pertinent part:

> If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or **it may enter such other order as it deems just under the circumstances**.

Fed.R.Crim.P. 16(d)(2) (emphasis added). Given that the enumerated sanctions in this rule are unavailable here because Plaintiff's supposed failure to provide discovery is alleged after the verdict has been rendered, Defendants urge the court to "reverse the jury's verdict and enter a judgment of acquittal against all Defendants." Such a reversal is warranted when "[t]he nondisclosure has prejudiced the defendant's substantial rights." United States v. McClain, 1995 WL 319088 at *2 (6th Cir. 1995) citing United States v. Brown, 871 F.2d 80, 82 (8th Cir. 1989). As explained in detail below (see Section III), the court finds that Plaintiff's failure to comply with discovery

did not prejudice Defendants' substantial rights. Thus, Defendants' Motion For Entry of Judgment of Acquittal is denied.

II.

Defendants, in the alternative, also move the court for a new trial with respect to Count 1 through 41. Defendants assert several reasons why such relief is appropriate. Specifically, Defendants claim that Plaintiff 1) failed to provide Defendants with exculpatory and impeachment evidence, 2) violated Fed.R.Crim.P. 16(a) ("FRCP 16(a)") by failing to produce the substance of oral statements made by current and former Clinitec employees, 3) conducted numerous *ex parte* meetings with current and former Clinitec employees, in violation of Ohio Disciplinary Rule 7-104 ("DR 7-104"), and 4) engaged in prosecutorial misconduct by making prejudicial statements in closing arguments.

The decision whether to grant a new trial is left to the sound discretion of the district court and will not be reversed absent a clear abuse of discretion. United States v. Pierce, 62 F.3d 818 (6th Cir. 1995). Defendants bear the burden of proving that a new trial should be granted. Id. Motions for a new trial are disfavored and should be granted with caution. United States v. Glover, 21 F.3d 133, 138 (6th Cir. 1994).

To be granted a new trial on the grounds of newly discovered evidence, a defendant must show that: 1) the new evidence was discovered after the trial; 2) the evidence could not have been discovered earlier with due diligence; 3) the evidence is material and not merely cumulative or impeaching; and 4) the evidence likely would produce an

acquittal. United States v. Pierce, 62 F.3d at 824 (citations omitted). To merit a new trial, a defendant must satisfy his burden of proof by proving all four of these factors. United States v. Turner, 995 F.2d 1357, 1364 (6th Cir. 1993).

When the defendant claims that the newly discovered evidence at issue is exculpatory evidence that the government failed to turn over in violation of Brady, however, he "should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal." United States v. O'Dell, 805 F.2d 637, 641 (6th Cir. 1986) (quoting United States v. Agurs, 427 U.S. 97, 111(1976)). Instead, the defendant must show only that the favorable evidence at issue was "material," as defined by opinions interpreting Brady. Id.

In Kyles v. Whitley 115 S.Ct. 1555 (1995), the Supreme Court quoted the holding in Brady "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good or bad faith of the prosecution." Id. at 1565 (quoting Brady v. Maryland, 373 U.S. 83, 87 (1963). A Brady claim may arise in three instances:

> [f]irst, where previously undisclosed evidence revealed that the prosecution introduced trial testimony that it knew or should have known was perjured; second, where the Government failed to accede to a defense request for disclosure of some specific kind of exculpatory evidence; and third, where the Government failed to volunteer exculpatory

> evidence never requested, or requested only in a general way.

Id. Any favorable evidence, irrespective of whether it was requested, is "material" if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id. Whether evidence is "material" does not turn on "whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Id. As such, "a Brady claim does not require a showing that introduction of the exculpatory evidence would have rendered the overall evidence insufficient to convict." United States v. Frost, 125 F.3d 346, 383 (6th Cir. 1997). Finally, "courts should evaluate the material effect of exculpatory evidence by examining the evidence collectively, not item-by-item."[1] Id.

With these legal standards in mind, the court now will examine the allegedly newly discovered evidence to determine whether a new trial is warranted.

A. Plaintiff's Meetings With Arrendale

On July 21, 1997, six days into Defendants' trial, Plaintiff called Wendy Vincent Arrendale ("Arrendale") as a

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[1] As the Supreme court instructed, the court will "evaluate the tendency and force of the undisclosed evidence item by item; there is no other way. [The court will then] evaluate its cumulative effect for purposes of materiality separately. . . ." Kyles v. Whitley, 115 S.Ct. at 1567 n.10.

witness in its case-in-chief. She testified, inter alia, that she had raised some questions with her supervisors concerning the manner in which blood glucose stick test were being billed by Clinitec – the practice which eventually led to Defendants' convictions. Specifically, Arrendale testified that she showed Sam Shaheen ("Shaheen"), a vice president in charge of operations, and one of the Defendants, Pinkerton, a regulation from the "Medicare Manual" ("the Manual") that stated that "if we performed the tests, we could bill for it, and if the nursing home or other lab performed the test, they did the billing for it."[2] Arrendale testified, however, that she was never able again to find the Manual which she claimed to have shown to Shaheen and Pinkerton. Further testimony by Arrendale indicated that, despite requests, she was unable to show the Manual to others because when she looked for it in the place where manuals were kept, it was not there.

On July 22, 1997, one day after she testified in this case, Arrendale filed a civil complaint against Clinitec and Bayliss, two of the Defendants in this case, in the Court of Common Pleas for Tuscarawas County, Ohio. Pursuant to discovery in that case, the depositions of Arrendale and Special Agent Thomas Fluhart ("Fluhart") of the Ohio Attorney General's Office Division of Medicaid Fraud Control were taken. These depositions, Defendants claim, brought to light for the first time that at at least one of several meetings between Arrendale and Plaintiff's attorneys and

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[2] This testimony was crucial in light of the fact that one element of the crimes charged in the Indictment is that Defendants had knowledge that the "gluclose, stick" claims they were submitting to Medicare and Medicaid were false, fraudulent, or fictitious.

investigators, which Defendants allegedly did net know were taking place, Arrendale was shown various Medicaid and Medicare documents, none of which she could identify as "the Manual" she claimed to have shown to Shaheen and Pinkerton. Defendants claim that had they known that when plaintiff's attorneys and/or investigators showed Arrendale a pile of publications that she was unable to identify any as "the Manual" shown to Shaheen and Pinkerton, their cross-examination of Arrendale "would have tended to show that Arrendale had committed perjury in the grand jury where she first invented the story of finding a non-existent prohibition in the Medicare Manual." Consequently, Defendants assert that this fact -- that Arrendale was never able to identify for Plaintiff's attorneys and investigators "the Manual" she had shown Shaheen and Pinkerton - is newly discovered exculpatory evidence that Plaintiff should have disclosed under Brady.

The court finds that Defendants fail to satisfy all of the elements of the Pierce test. Specifically, Defendants are unable to demonstrate that this evidence was discovered after trial. On direct examination of Arrendale, the following testimony was given:

> Q: Were you asked to see if you could find [the] regulation by agents of the government?
>
> A: Yes.
>
> Q: Were you ever able to locate that?
>
> A: No.

Once again, on cross examination, while not specifically referring to a meeting with government agents, similar testimony was evoked:

Q: There came a time later that you were asked to show [the regulation] to other people?

A: Um-hum.

Q: Am I correct?

A: Yes.

Q: And were you able to do that?

A: No.

Several minutes later, Arrendale again testified that she met with government agents who had shown her both the Medicare and Medicaid manual:

Q: So. . . you met alone with the agents. Where did you meet?

A: I believe the first meeting was at Clinitec.

Q: Okay. And there was a second meeting?

A: I don't recall how many meetings.

* * *

Q: Now did they show you any document, did they show you any regulation, law or document?

A: Yes.

Q: What did they show you?

A: In the Medicaid manual.

* * *

Q: How about the Medicare manual, did you call that to their attention?

A: I believe so.

While Arrendale did not testify explicitly in this last quoted testimony that she was unable to find the regulation, she did make it clear in earlier testimony quoted above that such was the case. Thus, as the above quoted testimony demonstrates, it was clear from Arrendale's trial testimony exactly what Defendants claim was not known by them until after trial – that Arrendale had met with government agents, that she was shown both Medicaid and Medicare manuals, and that she was unable to identify the regulation she had shown Shaheen and Pinkerton. Armed with this testimony, Defendants were well-equipped to attempt to establish exactly what Defendants claim could not be established because "the true facts were never made known to defense counsel before trial" -- that "Arrendale had committed perjury in the grand jury where she first invented the story of finding a non-existent prohibition in the Medicare Manual." Consequently, the

court finds that this evidence was not newly discovered after trial.

B. Arrendale's Lawsuit

As mentioned above, on July 22, 1997, Arrendale filed a civil complaint against Clinitec and Bayliss, two of the Defendants in this case, in the Court of Common Pleas for Tuscarawas County, Ohio. Defendants assert that the fact that Arrendale was filing a civil suit against the defendants she was testifying against in a criminal matter is newly discovered exculpatory evidence that Plaintiff should have disclosed under Brady. The court, however, disagrees because Defendants have failed to establish the first element of the Pierce test, i.e. that the evidence was newly discovered.

On July 23, 1997, one day after Arrendale's attorney filed the lawsuit, an article appeared in Bayliss's hometown newspaper with the headline, "Ex-Clinitec employee sues for $1 million." Prior to Defendants' trial ending, either on the morning of July 23rd or July 24th, 1997, Steven Bell ("Bell"), Defendants' attorney, handed a copy of the article to Rowland before court began, which has a fax banner indicating it was received at Ulmer & Berne, Bell's law firm, on Wednesday, July 23,1997 at 8:27. The fax banner also states "Caretec Services [a Bayliss company], 7-23-97, 8:32." Thus, it is clear from the fax banner that Defendants had knowledge of the lawsuit prior to resting on July 24, 1997.

However, Defendants contend that while they might have had knowledge of the lawsuit prior to the end of trial, their knowledge of the suit was acquired so late in the game that it rendered such evidence useless at trial. The court

thinks it is important to note though that despite having such knowledge prior to the end of trial, Defendants did not avail themselves of any opportunity to use such evidence at trial, e.g. by moving for a mistrial or by requesting leave of court to subpoena Arrendale for the purpose of questioning her about possible bias against Defendants. Additionally, the test in Pierce is clear -- when Defendants have knowledge at trial of the evidence which they claim is newly discovered, a new trial is not warranted. There is no mention in Pierce or in any of its progeny that the requirement that the evidence must be discovered after trial is waivable in extenuating circumstances. Consequently, the court holds that the fact that Arrendale was filing a civil suit against Defendants is not newly discovered evidence.

C. Bettac's May 6, 1996 Interview Memorandum

Attached to Plaintiff's Brief in Opposition to Defendants' Motion is a May 6, 1996 Interview memorandum prepared by John Bettac ("Bettac"), Special Agent of the United States Department of Health and Human Services, Office of Inspector General, Office of Investigations. In this memorandum, Bettac noted that Arrendale said that "she believed that they [Defendants] quit billing for the glucose test shortly after she told them about the regulation she had read." Defendants contend that this statement of Arrendale's in Bettac's memorandum is newly discovered exculpatory evidence that plaintiff should have disclosed under Brady. The court agrees. However, because "courts should evaluate the material effect of exculpatory evidence by examining the evidence collectively, not item-by-item," United States v. Frost 125 F.3d at 383, the court will examine whether such nondisclosure prevented Defendants from receiving "a fair

trial, understood as a trial resulting in a verdict worthy of confidence" only after the court determines which evidence should be included in this analysis. Kyles v. Whitley, 115 S.Ct. at 1655.

D. Rob McCauley's July 5, 1994 Meeting with Connie Nearhood

At Defendants' trial, Rod McCauley ("McCauley"), a former employee of Clinitec, testified for Plaintiff. At trial, he testified, among other things, that he discussed with both Bayliss and Pinkerton his concerns about the propriety of Clinitec's glucose billing.

On December 4, 1997, Assistant United States Attorney Ann Rowland ("Rowland") faxed to Defendants' attorney Bell a letter in which Rowland explained:

> I also learned yesterday for the first time that Connie Nearhood [a Special Assistant United States Attorney] asked Rod McCauley, before he appeared in the grand jury, to review his July 5, 1994 report of [the] interview. He did so and noted on the report that he did not recall the following:
>
> 1) In paragraph 8, he said he did not recall that the meeting with Hope Foster was prompted by a smaller competitor to a nursing home client of Clinitec Labs. He explained to Connie Nearhood that he, Mr. Bayliss and Mr. Pinkerton met with Ms. Foster, but at the time of the Grand Jury he could not recall what prompted the meeting.

Defendants assert that this evidence -- that "a witness whose summary was given to the defendant had apparently at a point subsequently had said to the government, 'That's not what I told you.'" -- is newly discovered exculpatory evidence that Plaintiff should have disclosed under Brady. The court disagrees.

The crux of Defendants' assertion that McCauley's failure to recall that the meeting with Hope Foster was prompted by a smaller competitor to a nursing home client of Clinitec Labs is newly discovered exculpatory evidence that Plaintiff should have disclosed under Brady is that Plaintiff made statements in its closing argument referring to McCauley that were inconsistent with later changes made to that summary by McCauley. Defendants misconstrue this point. On July 5, 1994, McCauley was interviewed by Nearhood regarding the subject matter of this case. More than a year and a half later, on February 28, 1996, McCauley adopted the memorandum of interview of July 5,1994, and made notations of "I don't recall" next to certain portions, namely that the meeting with Hope Foster was prompted by a smaller competitor to a nursing home client of Clinitec Labs. While Defendants characterize this statement of McCauley's as "inconsistent," the fact that a witness says one thing on one day and many months later cannot remember what he previously said is not an inconsistent statement, rather it is simply evidence of the limitations of human memory. Additionally, at trial, McCauley testified that the meeting with Hope Foster was to review a new sales brochure and to discuss "something with the billing." In light of such testimony, to the extent his trial testimony was inconsistent with the July 5, 1994 memorandum, Defendants were aware

of the inconsistency and, in the following exchange, exploited it on re-cross examination:

> Q: Do you remember telling Special Agent Grimes and Fluhart on the day of your interview back in 1994 that what you wanted to discuss with Hope Foster was whether providing free glucose strips to the nursing homes constituted a kickback?
>
> A: I don't recall. I don't. I don't recall.
>
> Q: You don't recall telling them that what you were concerned about and what you wanted to discuss with Hope Foster was not billing issues but kickback issues?
>
> A: I don't recall what we discussed, it was that long ago, okay. I know it was an issue with the — sorry. They were there because of Clinitec Lab, that's all I recall of that conversation with them.

Given such testimony, Defendants are unable to demonstrate that the fact that McCauley could not recall whether the meeting with Hope Foster was prompted by a smaller competitor to a nursing home client of Clinitec Labs was discovered after trial. Consequently, the court concludes that

this evidence is not newly discovered exculpatory evidence that Plaintiff should have disclosed under Brady.[3]

After this analysis, the court is left with only one piece of newsy discovered Brady material -- Arrendale's statement that "she believed that they [Defendants] quit billing for the glucose test shortly after she told them about the regulation she had read." As stated above, Brady requires the prosecution to provide evidence that is favorable to the accused and "material" to guilt or innocence, regardless of the good or bad faith of the prosecution. Whether evidence is "material" turns on whether in the evidence's absence Defendants "received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles v. Whitley, 115 S.Ct. at 1565. Given the qualified nature of Arrendale's statement ("she believed that they . . .") and that the computer data from Clinitec and all the other employees who testified about the billing stated that the billing for the glucose test continued at least 2 years after Arrendale said she showed Shaheen and Pinkerton the regulation, the absence of

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[3] Additionally, although this statement was required to be produced under the Jencks Act because it relates to the subject matter "as to which the witness testified," United States v. Susskind, 4 F.3d 1400, 1404 (6th Cir. 1993), nondisclosure of discoverable evidence merits a reversal only if such nondisclosure results in substantial prejudice to the defendant. United States v. Miller 116 F.3d 641, 681 (2nd Cir. 1997); United States v Phillip, 948 F.2d 241, 251 (6th Cir. 1991). Here, given that Defendants were apprized by way of McCauley's re-cross examination that he was unable to recall the purpose of the meeting with Hope Foster, such nondisclosure did not result in substantial prejudice to Defendants.

Arrendale's statement does not render the verdict unworthy of confidence. Had there been no other evidence that the billing for the glucose test continued after Arrendale said she showed Shaheen and Pinkerton the regulation, the court's confidence in the verdict would have been diminished. However, such was not the case. Consequently, Defendants' Motion For a New Trial on the grounds of newly discovered evidence is denied.

III.

Defendants contend that Plaintiff's failure to disclose the notes and summaries of interviews conducted by Plaintiff of employees of Clinitec constituted a violation of Fed.R Crim.P. 16(a),[4] the affirmative disclosure requirements of Brady, and the Jencks Act, 18 U.S.C. Sec. 3500 (1994). Plaintiff responds by asserting that it disclosed all it was required to by Fed.R.Crim.P. 16(a), the affirmative disclosure requirements of Brady, and the Jencks Act, 18 U.S.C. Sec. 3500 (1994). In determining the proper procedure for resolving such a situation, i.e., where Defendants claim they are entitled to certain documents, but Plaintiff says they are not, the court is guided by the Seventh Circuit's decision in U.S. v. Allen, 798 F.2d 985 (7th Cir. 1986), to which the Sixth Circuit has cited favorably. See United States v. Grecni, 940 F.2d 663, 1191 WL 139703,**5 (6th Cir.(Ohio)). In Allen, the Seventh Circuit held that:

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[4] Defendants Pinkerton and Bayliss have no standing to raise this issue because Plaintiff was not obligated under Rule 16 to turn over Clinitec employee statements to them.

> if the defendant claims that the documents he seeks are statements as defined by the Jencks Act, but the government says they are not, then the presumption should be that the district court should hold an in camera hearing and after reviewing the documents make a determination of what should be turned over to the defendant.

Allen, 798 F.2d at 994. Additionally, the Seventh Circuit noted that in the Brady area, unlike Jencks, an in camera hearing is not presumptively proper, rather the district court can "rely on prosecutorial assertions that exculpatory material does not exist." Id. at 995-96. Despite such distinction between Jencks and Brady disputes, and out of an abundance of caution, the court has reviewed in camera all the documents in question to determine if Plaintiff's failure to disclose the notes and summaries of interviews conducted by Plaintiff of employees of Clinitec constituted a violation of Fed.R. Crim.P. 16(a), Brady, or the Jencks Act.

Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure provides:

> (a) Statement Of Defendant. Upon request of a defendant the government must disclose to the defendant and to make available for inspection, copying, or photographing: any relevant or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may

become known, to the attorney for the government; that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. The government must also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the government to be a government agent if the government intends to use that statement at trial. Upon request of a defendant which is an organization such as a corporation, partnership, association or labor union, the government must disclose to the defendant any of the foregoing statements made by a person who the government contends (1) was, at the time of making the statement so situated as a director, officer, employee, or agent as to have been able legally to bind the defendant in respect to the subject of the statement, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as a director, officer, employee, or agent as to have been able legally to bind the defendant in respect to that alleged conduct in which the person was involved.

The purpose of Rule 16 is to insure that a corporate defendant is aware of all statements that will be used against it. United States v. Lin Lyn Trading, Ltd., 911 F. Supp. 494, 497 (D. Utah 1996). Thus, the government should disclose statements of all persons whose statements or conduct it seeks to use in order to hold the corporate defendant criminally responsible. Id. However, the court in Lin Lyn noted that the rule does not require production of statements by present or former agents of a corporation of anything that might be relevant to the case. Id.

When a defendant claims in a new trial motion that the government has not complied with his discovery requests, the court must examine defendant's efforts to bring the alleged error to the court's attention. United States v. Ross, 511 F.2d 757, 761 (5th Cir. 1975). When a defendant discovers at trial that the government has failed to disclose a statement required to be disclosed by Rule 16, and fails to object, he has waived the right to raise the issue in a motion for a new trial. United States v. Armes, 470 F.2d 1353, 1354-55 (6th Cir. 1973); United States v. Jimenez, 618 F.Supp. 799, 803 (S.D.N.Y. 1985), aff'd, United States v. Jimenez, 789 F.2d 167, 169-70 (2nd Cir. 1986).

On January 15,1997, a written request was made upon plaintiff. In that discovery request, Defendants asked Plaintiff to provide:

> Copies of any written or recorded statements made by Defendant NHML, Inc. within the possession, custody or control of the government, and (b) that portion of any written record containing the substance of any

> oral statement(s) made by NHML, Inc. in response to interrogation by any person(s) employed by either the United States or the State of Ohio, and (c) the recorded testimony of NHML, Inc. before any grand jury. For purposes of this request, the requested statements of NHML, Inc. include (but are not limited to) statements made by any and all current and former employees of NHML, Inc. (doing business as Clinitec or Clinitec Laboratory), and the statements of any and all such other persons who might be included within the descriptions contained in rule 16(a)(1)(A)(1) and/or (2), Fed. R. Crim. P.

On January 30, 1997, Plaintiff produced its response to the foregoing discovery request. Included in such response were Grand Jury transcripts of Arrendale, Christel Rypien, Barbara Marting, Mike Mathews, Terry Jones, Michael Hren, Rachael Visnick, Kevin Stoltman, Kurt Rump, Rod McCauley, Charles Graham, Laura Roberts, Shaheen and Kim Kimmel. Plaintiff also provided some summaries containing the substance of oral statements made outside the Grand Jury by then current and former employees of Clinitec. Despite Plaintiff's having produced these materials, Defendant Clinitec contends that Plaintiff's failure to produce notes and summaries of Plaintiff's interviews with former and current Clinitec employees -- in the face of a specific discovery request seeking such interviews -- violated Rule 16(a) of the Federal Rules of Criminal Procedure.

Given that Clinitec was a corporation during the relevant time period, under Rule 16(a), Plaintiff was required

to turn over any statements made by a person who Plaintiff contends "(1) was, at the time of making the statement, so situated as a director, officer, employee, or agent as to have been able legally to bind the defendant in respect to the subject of the statement, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as a director, officer, employee; or agent as to have been able legally to bind the defendant in respect to that alleged conduct in which the person was involved." First, Plaintiff contends that none of the persons whose statements were not turned over were 1) able to legally bind Clinitec in respect to the subject of the statement or 2) personally involved in the alleged conduct constituting the offense. Also, with the exception of testimony by Arrendale and Marting, Clinitec has failed to allege that any Clinitec employee, whose interview notes and summary Clinitec seeks, testified on a matter that bound the corporation that had not been turned over in discovery. This failure, however, might be the result of Clinitec's lack of knowledge as to the contents of these interview notes and summaries. Nonetheless, with the exception of testimony by Arrendale and Marting, after a thorough review of the trial transcript, the court cannot find any testimony from persons whose interview notes and summaries were not turned over to Defendant Clinitec on a matter that bound Clinitec that had not been turned over in discovery. Consequently, the court finds that Plaintiff did not violate Rule 16(a) when it failed to turn over interview notes and summaries of then-current and former Clinitec employees.

In regard to the interview notes and summaries of Arrendale and Marting, for purposes of this Order only, the court will assume that 1) Plaintiff violated Rule 16(a) when it

failed to disclose such interview notes and summaries and 2) Clinitec did not waive the right to raise such issue. Nondisclosure of discoverable evidence merits a reversal only if such nondisclosure results in substantial prejudice to the defendant. United States v. Miller, 116 F.3d 641, 681 (2nd Cir. 1997); United States v. Phillip, 948 F.2d 241, 251 (6th Cir. 1991). This standard also applies to nondisclosure of a defendant's statement. United States v. Brown, 871 F.2d 80, 82 (8th Cir. 1989); United States v. Peters, 625 F.2d 366, 369 (10th Cir. 1980). Because the court finds, as discussed below, that such nondisclosure did not result in substantial prejudice to Clinitec, Clinitec's Motion For a New Trial or Alternatively For Acquittal on the ground that Rule 16 was violated is denied.

After a careful review of the entire record, including the interview files submitted by Plaintiff to the court for an in camera inspection, the court concludes that the prejudice, if any, resulting from Plaintiff's failure to produce summaries of interviews with Arrendale and Marting is not substantial. With respect to the Marting interview notes that were not turned over, the entire substance of these interview notes are in Marting's testimony in front of the grand jury, which was provided to Clinitec. Consequently, given that Clinitec was aware of all matters contained in the Marting interview notes by way of Marting's grand jury testimony, it is difficult to ascertain any prejudice suffered by Clinitec as a result of such notes' nondisclosure.

While the court ultimately reaches the same conclusion with respect to the nondisclosed interview notes and summaries of Arrendale - that Clinitec was not substantially prejudiced by their nondisclosure - the situation is more

complicated. As a result of Plaintiff's nondisclosure of interview notes and summaries of meetings with Arrendale, Clinitec was not aware of, at least by way of the notes and summaries, the fact that when Arrendale met with Plaintiff's agents and was shown various books, she was unable to identify the manual she had shown Pinkerton and Shaheen. However, such nondisclosure did not result in substantial prejudice to Clinitec because Clinitec was aware (or at least should have been), by way of the direct examination of Arrendale, that she had been unable to identify the regulation for government agents when they had placed various books in front of her (see Section II(A)).

Defendants also contend that they were possibly entitled to receive the interview summaries under the Jencks Act, 18 U.S.C. sec. 3500 (1994), depending on the substance of the summaries. The Jencks Act requires the Government to produce to the defense, in time for use in cross-examination, "any statement . . . of the witness in [its] possession . . . which relates to the subject matter as to which the witness has testified." 18 U.S.C. Sec. 3500(b). The Jencks Act defines a "statement," in relevant part, as:

> (1) a written statement made by said witness and signed or otherwise adopted or approved by him; [or]
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by

> said witness and recorded contemporaneously with the making of such oral statement.

18 U.S.C. Sec. 3500(e).

Despite Defendants contention that the interview summaries constituted Jencks' material, the court finds that the interview summaries were not "statements" within the meaning of the Jencks Act because they were neither a "substantially verbatim recital" of what the interviewees said, nor were they writings that the interviewees later signed or adopted in any way. Rather, the interview summaries were just that- summaries that were never signed or adopted by the interviewees constituting a concise description of what the interviewees said, a far cry from a "substantially verbatim recital." Consequently, the court finds that the interview summaries were not materials which Plaintiff was required to product to Defendants under the Jencks Act.

Defendants also argue that the failure to turn over the interview summaries constituted a violation of Brady. As stated above, under Brady the Government is required to made an affirmative disclosure of all material exculpatory information. See Kyles v. Whitley, 514 U.S. 419 (1995). For Brady purposes, the Supreme Court has instructed that impeachment evidence must be treated as exculpatory. See id. (citing United States v. Bagley, 473 U.S. 667 (1985)). The court, after reviewing the interview files, concludes that, other than the limited Brady material in the interview files already discussed, that there is no Brady material in these files which Plaintiff was required to disclosure to Defendants.

Finally, Defendants contend that, depending on the substance of Plaintiff's investigative files, both the attorneys' and agents' notes from such files need to be produced to Defendants under Rule 16, the Jencks Act or as Brady material. A necessary part of the court's above analysis of whether Plaintiff's failure to disclose the summaries of interviews conducted by Plaintiff of former and then-current employees of Clinitec constituted a violation of Fed R.Cr.Pr. 16(a), the affirmative disclosure requirements of Brady, and the Jencks Act, was an exhaustive review of the entire contents of Plaintiff's investigative files. As discussed in detail above, except the limited material that has already been discussed, the court was unable to find any nondisclosed material, including all the attorneys' and agents' notes, that should have been disclosed pursuant to Fed.R.Cr.Pr. 16(a), the affirmative disclosure requirements of Brady, or the Jencks Act. Consequently, Defendants are not entitled to disclosure of the attorneys' or agents' notes from Plaintiff's investigative files.[5]

IV.

Defendants contend that, unknown to them, Plaintiff's attorneys and investigators conducted numerous pre- and post-indictment ex parte interrogations of both current and former Clinitec employees. Defendants allege that: 1) Plaintiff's pre-indictment ex parte contacts with current Clinitec employees violated Disciplinary Rule 7-104 of the Ohio Code of Professional Responsibility ("DR 7-104"), which is the

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[5] Such a finding obviates the need for a discussion of whether such notes are protected by any privilege.

ethical rule governing communications between an attorney and an adverse party; 2) Plaintiff's ex parte communications with former Clinitec employees were possibly outside the boundaries within which these communications can occur, as set forth by the Supreme Court of Ohio Board of Commissioners on Grievances and Discipline, and 3) Plaintiff's post-indictment ex parte contacts with current Clinitec employees violated both DR 7-104 and Clinitec's Sixth Amendment right to effective assistance of counsel. The court will now address each of these issues.

A. Plaintiff's Pre-indictment *Ex Parte* Contacts With Current Clinitec Employees

DR 7-104, entitled "Communicating With One of Adverse Interest" provides:

> (A) During the course of his representation of a client a lawyer shall not:
>
> > (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.
> >
> > (2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or

> have a reasonable possibility of being in conflict with the interests of his client.

DR 7-104.

Defendants contend that Plaintiff's pre-indictment contacts with current Clinitec employees "clearly violated DR 7-104." In making such assertion, Defendants cite to United States v. Hammad, 858 F.2d 834 (2d Cir.1988) for the proposition that DR 7-104 (or other states' equivalent of) prohibits pre-indictment contacts with a represented subject of an investigation. Such holding was reached, however, in answering a slightly different question than this case presents: "to what extent does DR 7-104(A)(1) restrict the use of informants by government prosecutors prior to indictment, but after a suspect has retained counsel in connection with the subject matter of a criminal investigation?" Id. at 839. Additionally, the Hammad court urged "restraint in applying the rule to criminal investigations to avoid handcuffing law enforcement officers in their efforts to develop evidence." Id. at 838.

Nonetheless, even if Hammad were directly on point in the issue presented here, the vast majority of courts have held that DR 7-104(A)(1) was "not intended to preclude undercover investigations of unindicted suspects merely because they have retained counsel." United States v. Pyans, 903 F.2d 731, 739 (10th Cir. 1990). See also United States v. Sutton, 801 F.2d 1346, 1366 (D.C. Cir. 1986); United Sates v. Fitterer, 710 F.2d 1328, 1333 (8th Cir.) ("We do not believe that DR-7-104(A)(1) . . . was intended to stymie undercover operations when the subject retains counsel."),

cert. denied, 464 U.S. 852 (1983); United States v. Kenny, 645 F.2d 1323, 1339 (9th Cir. Cir.) ("[T]he government's use of such investigative techniques at this stage of a criminal matter does not implicate the sorts of ethical problems addressed by the Code."), cert. denied, 452 U.S. 920 (1981). In light of such case law, this court finds that Plaintiff's pre-indictment contacts with current Clinitec employees were not in violation of DR 7-104.

B. Plaintiff's Post-indictment *Ex Parte* Contacts With Former Clinitec Employees

Defendants assert that while Plaintiff's post-indictment ex parte communications with former Clinitec employees "are not *per se* a violation of [DR 7-104] . . . the Defendants . . . do not know whether" Plaintiff exceeded the boundaries within which these communications can occur as set forth by the Supreme Court of Ohio Board of Commissioners on Grievances and Discipline ("the Board") in Advisory Opinion 96-1, issued on February 2,1996. In this advisory opinion, the Board stated that contact cannot be made ex parte with former employees represented by their own counsel or former employees who have asked the corporations' counsel to represent them. However, in affidavits submitted by Rowland, Nearhood, and Bettac, each of these persons attest that no former Clinitec employees stated to government counsel or agents that they desired their own representation or the representation of Clinitec's counsel. Consequently, no state rule was violated by Plaintiff's ex parte contact with former Clinitec employees. In any event, this rule does not prohibit contact with former employees and appears to be for the protection of former employees, not for the protection of their former employer.

C. Plaintiffs *Ex Parte* Communications With Current Clinitec Employees

1. DR 7-104

Defendants argue that Plaintiff's ex parte communications with current Clinitec employees violated DR 7-104. Specifically, Defendants assert that the post-indictment ex parte interviews of Arrendale, an employee of Clinitec at the time, violated DR 7-104. The court disagrees.

In Advisory Opinion 90-20, the Ohio Supreme Court Board of Commissioners on Grievances and Discipline advises attorneys that they may contact corporate employees without seeking permission of corporate counsel except "when seeking to interview management employees, employees who can 'speak for' or bind the corporation, employees whose opinions form the basis of management decisions and employees whose act or omission in connection with the controversy may be imputed to, or an admission of, the corporation." Ohio Advisory Op. 90-20 at 4 (1990). The effect of this rule is that attorneys are permitted to speak to many corporate employees without informing the corporation's attorney unless the employees' statements could be binding on the corporation or if the employees' conduct gave rise to the dispute. Here, Defendants have failed to allege, much less begin to establish, that Arrendale was an employee falling under the prohibition of DR 7-104. Nonetheless, even if Defendants had alleged such, the court would find such allegation tenuous given that there appears to be nothing in the record suggesting that Arrendale was an "management employee, [an] employee who can 'speak for' or bind the corporation, [an] employee whose opinions form

the basis of management decisions [or an] employees whose act or Commission in connection with the controversy may be imputed to, or an admission of, the corporation." Id. Consequently, the court finds that Plaintiff did not violate DR 7-104 when it conducted ex parte communications with current Clinitec employee Arrendale.[6]

2. Sixth Amendment

Defendants assert that Plaintiff's post-indictment contacts with current Clinitec employee Arrendale violated Clinitec's Sixth Amendment right to effective assistance of counsel. Plaintiff responds by stating that none of the cases Defendants cite hold that "the Sixth Amendment is implicated by post-indictment interviews of non-control group employees of a defendant corporation." After careful consideration, the court finds that Plaintiffs post-indictment contacts with Arrendale did not violate Clinitec's Sixth Amendment right to effective assistance of counsel.

Upon indictment, a defendant becomes an "accused" with a right to counsel guaranteed by the Sixth Amendment. See Brewer v. Williams, 430 U.S. 387 (1977); Massiah v. United States, 377 U.S. 201 (1964). The guarantees of the Sixth Amendment apply to corporate defendants with the same force as to individual defendants. United States v. Rad-O-Lite of Philadelphia. Inc., 612 F.2d 740, 743 (3d Cir.1979). To give meaning to these guarantees, the Supreme Court has held

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[6] Given this finding, it is unnecessary for the court to determine whether Plaintiff was "authorized by law," pursuant to 28 C.F.R. Part 77, to have ex parte contact with current Clinitec employees.

that once a defendant, either an individual defendant or a corporate defendant becomes an "accused," it is improper for a government official to question that defendant out of the presence of counsel. Brewer v. Williams, 430 U.S. 387 (1977); Massiah v. United States, 377 U.S. 201 (1964). The dispositive question posed in this case is whether Arrendale was so situated that when Plaintiff engaged in ex parte communications with her, in essence, Plaintiff was communicating with Defendant Clinitec.

As discussed above in the context of analyzing whether Plaintiff violated DR 7-104 when it conducted ex parte communications with current Clinitec employee Arrendale, the court finds (and Defendants have not argued to the contrary) that Arrendale was not a management employee, an employee who can speak for or bind the corporation, an employee whose opinions form the basis of management decisions, or an employee whose act or omission in connection with the controversy may be imputed to, or an admission of, the corporation. Consequently, given Arrendale's employee status, the court finds that Plaintiff's communicating with Arrendale is not commensurate with communicating with Defendant Clinitec. Therefore, Defendants' Sixth Amendment claims fail.

V.

Defendants contend that the following statements made by Plaintiff's attorney Rowland in her closing argument were prejudicial:

> A note about Wendy Vincent Arrendale. She could not find the reference

in the Medicare manual and there isn't one, we would have produced it for you, that states the general rule you can't bill for a service you don't do. But Medicaid told them. And you will have those documents.

I submit that the logical inference from what Wendy Vincent Arrendale told you, maybe she is a busy-body, there is one in every office sort of nosing into everybody else's business, complaining, whining about this or that, that's fine, but at about the time that she found something in that – in her books and records of Clinitec, Medicaid issued a regulation, the first one on February 17th, 1991. You heard the testimony that goes to every provider, and one in '92.

Ladies and gentlemen, I would submit five years later she is just mistaken; that it was probably the Medicaid, not the Medicare, but the Medicaid manual that she found which says clearly in the '92 verse, paragraph three, "providers, including hospitals and independent laboratories, may bill the department only for those procedures they actually perform." Surprise, surprise.

Defendants claim that these prejudicial statements made by Rowland in her closing argument, which Defendants did not object to, constitute prosecutorial misconduct. Consequently, Defendants argue, as a result of this misconduct, they are entitled to a new trial.

Allegations of improper comments made by the prosecutor are reviewed for plain error when there has been no objection by the defense. United States v. Young, 470 U.S. 1 (1985). "The plain error doctrine mandates reversal 'only in exceptional circumstances' and only where the error is so plain that 'the trial judge and prosecutor were derelict in countenancing it.'" United States v. Slone, 833 F.2d 595, 598 (6th Cir. 1987) (quoting United States v. Mendez-Ortiz, 810 F.2d 76,79 (6th Cir. 1986). As a general rule, "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context." United States v. Young, 470 U.S. 1, 11 (1985).

The Sixth Circuit has articulated a standard for determining whether a defendant is entitled to a new trial as a result of statements made by a prosecutor at trial. United States v. Carroll, 26 F.3d 1380 (6th Cir. 1994). First, the court must "[d]etermine whether the prosecutor's remarks . . . were improper." Id. at 1387. Second, if the statements are determined to be improper, then the court must determine if the impropriety was flagrant under United States v. Leon, 534 F.2d 667 (6th Cir. 1976). Id. at 1385. To determine flagrancy, the court should consider four factors:

(1) whether the remarks tended to mislead the jury or to prejudice the accused;

(2) whether the remarks were isolated or extensive;

(3) whether the remarks were deliberately or accidentally placed before the jury; and

(4) the strength of the evidence against the accused.

Id. at 1384-85. If the comment is determined not to be flagrant, an appellate court will reverse only "when (1) the proof against the defendant was not overwhelming, (2) opposing counsel objected to the conduct, and (3) the district court failed to give a curative instruction." Id. at 1385-86. Under the Carroll test, the court's first task is to determine whether Rowland's remarks in the present case were improper. In United States v. Hart, 640 F.2d 856 (1981), after Defendant was convicted of possessing stolen mail, he appealed, arguing, inter alia, that he was entitled to have his conviction reversed because of prosecutorial expression of personal belief during closing argument. The Sixth Circuit held that it is "clear that there is nothing improper about" the following statements:

> 1) I suggest, ladies and gentlemen, with those facts, I have filled in each of the nine requisite boxes to make out a conviction on all three counts.
>
> 2) I submit that box is filled.
>
> 3) But I submit she knows it was stolen because her intimate friend is the one that signed it in the first endorsement.

Id. at 858 n.2. The court is unable to distinguish the contended statements of Rowland in her closing arguments from the permissible statements referenced above. Additionally, while the Sixth Circuit has cautioned that it is

"unprofessional for counsel to express a personal belief or opinion in the truth or falsity of any testimony," it recognized that "[o]n the other hand, counsel must be given leeway to argue reasonable inferences from the evidence." United States v. Collin, 78 F.3d at 1039-40. When viewing the statements at issue in context, it is clear that Rowland was doing exactly that - arguing reasonable inferences from the evidence. In fact, she even prefaced her statements by saying "I submit that the logical inference from what Wendy Vincent Arrendale told you. . . ." Because the court concludes that Rowland's statements were not improper, Defendants' Motion For a New Trial based on prosecutorial misconduct is denied.[7]

VI.

For all the reasons discussed above, Defendants' Motion For Entry of Judgment of Acquittal or Alternative Motion For New Trial (docket no. 102) is denied. This case is hereby set for sentencing on June 15, 1998, at 3:00 p.m.

IT IS SO ORDERED.

/s/_____
JUDGE SOLOMON OLIVER, JR.
UNITED STATES DISTRICT JUDGE

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[7] Even if the court were to determine that Rowland's remarks were improper expressions of personal belief, such statements were clearly not "flagrant" within the meaning of Leon and its progeny.

APPENDIX C

UNITES STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed March 28, 2000]

Nos. 98-3883/3884

UNITED STATES OF AMERICA,)
Plaintiff-Appellee,)
)
v.)
)
NHML, INC., dba CLINITEC,)
COLIN E. BAYLISS,)
RAYMOND H. PINKERTON,)
Defendants-Appellants.)
)

ORDER

BEFORE: NELSON and SILER, Circuit Judges; QUIST,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of

* The Honorable Gordon J. Quist, United States District Judge for the Western District of Michigan, sitting by designation.

this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk